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No. 91-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PUBLIC UTILITY DISTRICT NO. 1
OF DOUGLAS COUNTY, WASHINGTON,
Petitioner,

v.

BONNEVILLE POWER ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the Pacific Northwest Electric Power Planning and Conservation Act's provision for compensation to non-federal projects in the Columbia River Basin for "monetary costs and power losses" suffered as a result of fish protection measures "imposed" on such projects by federal agency action is limited to measures formally imposed by "federal law, regulation or order" or also includes measures necessarily imposed on non-federal projects as a practical matter as a direct result of federal agency action, such as water releases from upstream federal dams to maintain minimum flows to protect salmon runs?

(2) Whether the Ninth Circuit properly applied a "highly deferential" standard of review to the Bonneville Power Administration's interpretation of the compensation provision of the Act even though that agency had a direct and substantial financial interest in that interpretation?

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B: Department of Energy, Bonneville Power Administration, Final Policy for Compensating Non-Federal Hydroelectric Projects for Monetary Costs and Power Losses Caused by Federal Agency Actions To Implement Columbia River Basin Fish and Wildlife Program Measures, 54 *Fed. Reg.* 31074 (July 26, 1989).

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BONNEVILLE POWER ADMINISTRATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Public Utility District No. 1 of Douglas County, Washington, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the proceedings below on October 17, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported as *Public Utility District No. 1 of Douglas County, et al. v. Bonneville Power Administration* at 947 F.2d 386 and is reprinted in the Appendix hereto (hereafter "App.") as Appendix A, page 1a *infra*.[1]

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[1] Other petitioners below were Public Utility District No. 1 of Chelan County and Public Utility District No. 2 of Grant County. Puget Sound Power & Light Company and Portland General Electric Company were intervenors.

The regulations implementing section 4(h)(11)(A) of the Pacific Northwest Electric Power Planning and Conservation Act were published by Bonneville Power Administration in the Federal Register on July 26, 1989, 54 *Fed. Reg.* 31074, and the relevant portions are reprinted as Appendix B hereto, page 22a *infra*.

JURISDICTION

The regulations at issue were promulgated on July 26, 1989. Petitioner sought timely review in the Court of Appeals for the Ninth Circuit pursuant to 16 U.S.C. §839f(e)(5). The court of appeals rendered its opinion and judgment on October 17, 1991. No petitions for rehearing were filed.

The jurisdiction of the Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following provisions of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§839-839h:

(1) *Section 2(6), 16 U.S.C. §839(6)*

Sec. 2 The purpose of this Act, together with the provisions of other laws applicable to the Federal Columbia River Power System, are all intended to be construed in a consistent manner. Such purposes are also intended to be construed in a manner consistent with applicable environmental laws. Such purposes are:

* * *

> (6) to protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance

to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.

(2) *Section 4, 16 U.S.C. § 839b*

Sec. 4(a)(1) The purposes of this section are to provide for the prompt establishment and effective operation of the Pacific Northwest Electric Power and Conservation Planning Council, to further the purposes of this Act by the Council promptly preparing and adopting (A) a regional conservation and electric power plan and (B) a program to protect, mitigate, and enhance fish and wildlife, and to otherwise expeditiously and effectively carry out the Council's responsibilities and functions under this Act.

* * *

Sec. 4(h)(1)(A) The Council shall promptly develop and adopt, pursuant to this subsection, a program to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries.

* * *

Sec. 4(h)(1)(B)(6) The Council shall include in the program measures which it determines, on the basis set forth in paragraph (5), will—

* * *

(E) in the case of anadromous fish—

(i) provide for improved survival of such fish at hydroelectric facilities located on the Columbia River system; and

(ii) provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such fish as necessary to meet sound biological objectives.

* * *

Section 4(h)(10)(A) The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this Act and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this Act. Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.

* * *

Sec. 4(h)(11)(A) The administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—

(i) exercise such responsibilities consistent with the purposes of this Act and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated;

(ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under this subsection. If, and to the extent

that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.

STATEMENT OF THE CASE

The Bonneville Project Act of 1937, 16 U.S.C. §§832-832l, launched a massive program of hydropower development on the Columbia River which fueled the economic growth of the Pacific Northwest for four decades. By the end of the 1970's, however, the regional demand for the low cost federal energy marketed by the federal Bonneville Power Administration ("BPA") had outstripped the available supply, a development that threatened to disrupt long-standing supply contracts and engender interminable litigation over the reallocation of that supply. Congress began to address the problem in 1977, and the result of its efforts was the Pacific Northwest Electric Power Planning and Conservation Act of 1980 ("Pacific Northwest Power Act" or "Act"), 16 U.S.C. §§839-839h. The foregoing background and the BPA's initial implementation of the dominant power supply development, allocation and pricing aspects of the Act have previously been chronicled by this Court. *Aluminum Co. of America v. Central Lincoln Peoples Util. Dist.*, 467 U.S. 380 (1984).

The case presented by this petition deals with the other major purpose of the Act—its attempt to harmonize the power emphasis of previous legislation and the new authorizations of the Act with the need to protect and enhance the status of the dwindling salmon and steelhead fisheries of the Columbia River Basin, which have historically contributed as much as $150 million annually to the

region's economy. First, it mandated the Pacific Northwest Electric Power and Conservation Planning Council ("Council"), which the Act authorized the States of Washington, Oregon, Montana and Idaho to create by interstate compact, to develop a comprehensive fish and wildlife protection, mitigation and enhancement program to be implemented by the federal agencies responsible for (1) federal dam construction (Corps of Engineers and Bureau of Reclamation), (2) the marketing of such federally produced power (BPA) and (3) the licensing of non-federal hydropower projects (Federal Energy Regulatory Commission (FERC)). Second, it sought to end the uncertainty and controversy among the federal agencies and between those agencies and the FERC-licensed non-federal hydroprojects on the Columbia over the nature and extent of their respective obligations in helping maintain and restore the threatened fish resources. To that end it imposed the following duties on the federal agencies (section 4(h)(11)(A), 16 U.S.C. § 839b(h)(11)(A) (emphasis added)):

> (A) The Administrator [of the BPA] and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—
>
> (i) exercise such responsibilities consistent with the purposes of this Act and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated;
>
> (ii) exercise such responsibilities, taking into account at each relevant stage of decision

> making processes to the fullest extent practicable, the program adopted by the Council under this subsection. *If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.*

The compromise reflected in the emphasized portion of this section (hereafter referred to as the "compensation provision") was designed to resolve the growing impasse between power and fish interests on the Columbia over who would bear the costs of lost power revenues and other costs resulting from alteration of the operations of the non-federal projects necessitated by increasing need for minimum streamflows and other fish protection measures. The non-federal projects had been voluntarily cooperating with federal agency efforts to provide minimum flows during the low water years of 1977-80. App. at 44a-47a. During that period BPA estimated that its costs of providing such flows ranged from slightly under $1 million to almost $5 million annually, and the similar costs to the non-federal projects exceeded those amounts.[2] However, the non-federal project owners were having increasing difficulty obtaining the agreement of their wholesale customers to such releases. As the Director of the U.S. Fish and Wildlife Service informed the House Committee on Interstate and Foreign Commerce during hearings on the proposed leg-

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[2] Bonneville Power Administration, Final Environmental Impact Statement, *The Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* (December 1980) at B-38 and B-72.

islation in 1979, "[t]he prospect of reduced power production for the sake of fish is not always appealing to those responsible for providing light and heat to homes and industries." App. at 46a.

Basically, the compromise that was finally hammered out by an ad hoc committee of regional power and fish interests and incorporated in section 4(h)(11)(A) left with the non-federal projects the financial obligations associated with measures necessary to mitigate adverse fishery impacts caused by their respective projects. But "monetary costs and power losses" associated with all other measures taken to "protect, mitigate and enhance" fish and wildlife "not attributable to the development and operation of such project", generally flow maintenance measures to "enhance", not only protect the depleted stocks, were to be compensated by BPA and recouped in its power rates, thus spreading the general costs of such measures over all BPA power users in the region, not just the customers of the non-federal projects.

The BPA was slow to implement section 4(h)(11)(A) by regulation, even though the status of the fishery resource continued to deteriorate. It originally published a notice of intent to propose general regulations for comment in 1983, but later abandoned the effort as "premature". 48 *Fed. Reg.* 20117 (May 4, 1983); 54 *Fed. Reg.* 31074 (July 26, 1989) (App. at 22a).

In 1982 the Council adopted a fish and wildlife program providing, *inter alia*, for specified releases each Spring from federal dams on the Columbia to facilitate migration of juvenile salmon and steelhead to the Pacific Ocean. During 1987, however, the Council's Fish Passage Center requested the Corps of Engineers for the first time to release water in excess of the Program amounts because of unusually low flows in the tributary Snake River, which is downstream of the non-federal projects. The result was that four of the five non-federal downstream dams between

the federal dams and the Snake River (see map in Appendix E) were required to spill water because the increased flow rates exceeded their limited "run of the river" storage capacity and the capacity of available generators. 53 *Fed. Reg.* 21888-89 (June 10, 1988).

Three public utility districts (PUDs) owning the affected dams, including petitioner, filed claims for compensation, which were the first claims filed under the Act. While their claims were pending, BPA published a draft policy for handling compensation claims for public comment. *Id.* BPA subsequently settled the claims of the three PUDs by making the following payments: Douglas County PUD - 1315 megawatt hours of energy; Chelan County PUD - $163,134; Grant County PUD - $451,495. 54 *Fed. Reg.* 31074-75 (July 26, 1989) (App. at 22a).

BPA's final policy statement was published on July 26, 1989. It defined "measure" and "impose" as used in section 4(h)(11)(A) so as to exclude the kind of claims it had just settled with the PUDs and stated that settlement of those claims would not be viewed as a precedent for future compensation claims (*id.* at 31075):

> "Impose" or "imposition" refers to the act of applying fish and wildlife obligations or restrictions upon a claimant which the claimant must implement in order to comply with applicable Federal law, regulation, or order.
>
> "Measure" means a specific provision in the Program, as contemplated in the Northwest Power Act, calling upon a Federal agency or other entity to undertake actions to protect, mitigate, and enhance fish and wildlife in the Basin.
>
> "Program" means the Columbia River Basin Fish and Wildlife Program and amendment's thereto adopted by the Northwest Power Planning Council.

The BPA interpretation would only provide compensation for "measures" formally approved and included as part of the Council's "Program" and then only if such measures were also formally "imposed" on the non-federal projects and "which the claimant must implement in order to comply with applicable Federal law, regulation or order." BPA explained the basis for its interpretations in a separate decision document, the relevant portions of which are set out in Appendix C hereto (App. at 29a). It described its reasoning underlying its definition of "impose" or "imposition" as follows (*id.* at 34a, 35a):

> We believe Congress intended the word "impose" to refer to the legal obligation of a project operator to take a particular action or to refrain from a particular action, which obligation arises from an order, regulation, or other requirement applicable to the facility under authority of law. This is consistent with the commonly understood definition of impose: "To levy or exact as by authority; to lay as a burden, tax, duty or charge." [*Black's Law Dictionary* 680, (5th ed. 1979)].
>
> * * *
>
> Although the most likely circumstance for measures to be imposed is through orders involving FERC proceedings, we will examine claims for compensation when any Federal agency or court uses its regulatory authority to exact performance by an imposition.

The three PUDs sought review of the BPA regulation pursuant to 16 U.S.C. §839f(e)(5). Certain wholesale customers of the PUDs with long term contracts intervened.

The Ninth Circuit, applying a "highly deferential" standard of review (357 F.2d at 390), unanimously reversed what it characterized as the BPA's artificial dichotomy

between a "Program measure" and a "non-Program measure" as inconsistent with the plain language and purpose of the Act (*id.* at 392):

> Therefore, we reject the BPA's artificial dichotomy between a "Program measure" and a "non-Program measure." The Act is sufficiently clear that if, after considering the Program, something needs to be done by a federal agency to enhance fish survival, that is a measure, whether it is listed or not. Section 839b(h)(11)(A)(ii) does not limit compensable measures to those measures mentioned specifically in the Program.

However, what it gave the PUDs with one hand, the court, Judge Thompson dissenting, took away with the other, affirming BPA's definition of "impose". It did so by creating its own "artificial dichotomy" between subsections (i) and (ii) of section 4(h)(11)(A), reasoning as follows (*id.* at 393-94):

> Paragraph (i) is all-inclusive as to what an agency must consider to protect, mitigate, and enhance fish and wildlife: the Act, the Program, and other applicable law. If an agency does what is required by paragraph (i), there is no duty for the Administrator to bear the costs or losses to the non-federal projects, because the paragraph contains no provision contemplating that a non-federal project may be ordered to protect, mitigate, and enhance fish and wildlife through measures "which are not attributable to the development and operation of such project."
>
> Under paragraph (ii) the agencies must exercise their responsibilities by taking into account in their decisionmaking processes the program adopted by the Council. In contrast to paragraph (i), it is contemplated that in their decisionmaking they will impose measures on non-federal hy-

> droelectric projects, and that the measures will not be attributable to the development and operation of the project. If the agency imposes measures not attributable to the development and operation of the project, the Administrator must bear the losses or costs to that project.
>
> * * *
>
> It is our view that any losses to a non-federal project as a result of direct action by a federal agency such as the Corps under paraggraph (i) is not compensable because that paragraph does not require compensation. Federal action under paragraph (ii), on the other hand, contemplates the imposition of a measure on the non-federal hydroelectric project. The project must then itself carry out the measure to protect, mitigate, and enhance fish and wildlife, and the Administrator must compensate the project. Thus we find the BPA's definition of "impose" entirely reasonable in terms of the statute because it recognizes this important difference between the two paragraphs in section 839b(h)(11)(A).

In essence, a majority of the court concluded that if a federal agency considers "the Act, the *Program* and other applicable law" (emphasis added) as required by subsection (i), whatever action it takes to deal with fish and wildlife concerns may not include the imposition of remedial measures "not attributable" to individual non-federal projects. But if it "takes into account" the "Program" under subsection (ii), it will "impose" such measures. Nothing in the statute, its purposes, or legislative history supports that bizarre, Procrustean interpretation, which dismantles the crucial compromise between power and fishery interests reflected in that section.

REASONS FOR GRANTING THE WRIT

The Columbia River Basin fishery resource is a regional and national treasure providing $150 million annually to the economy in addition to immeasurable recreational benefits. The conflict between hydropower generation on the Columbia and maintenance of that fishery epitomizes a growing conflict throughout the nation. For example, the social and economic issues involved are similar to those that recently moved this Court to revisit, after 45 years, the scope of the Federal Energy Regulatory Commission's hydroproject licensing jurisdiction in the context of a dispute between FERC and the State of California over minimum streamflow regulation to maintain fish habitat. *California v. FERC*, 495 U.S. 490 (1990).

The Columbia fishery was reported to be in serious condition in 1980 when Congress enacted the Pacific Northwest Power Act. Forty years of inadequate management of that resource, resulting from the failure of the Federal Government to construct fish passage facilities on the early federal dams in the upper reaches of the Columbia River and the federal dam construction and regulatory agencies' failure to foresee the adverse impacts of a closely controlled lower river on downstream fish migration, came to a head during the course of congressional consideration of the Act. The result was a determination to establish a management regime in the Basin that it hoped would provide the framework for correcting the mistakes of the past and lay a firm foundation for better fisheries management in the future.

But Congress knew it was not writing on a clean slate. The principal power production mission of the federal and non-federal dams on the river had generated investments and expectations that were recognized to be in significant conflict with increased reliance on increased minimum flows at various seasons to facilitate fish passage. Consideration of the legislation was contemporaneous with extremely low

flow conditions in the river that threatened fishery stocks. Only the cooperative efforts by the federal and non-federal dam operators in altering their projects' operations averted disaster. But the cooperation sought by the fish agencies was sometimes only grudgingly obtained because of the resulting loss in power and power revenues to the power agencies associated with those operational changes. Congress sought to strike an equitable balance for the future between power and fish. It recognized that part of that equitable accommodation would necessarily involve compensation to non-federal projects suffering "monetary costs and power losses" as a result of any new regime.The result was section 4(h)(11)(A) of the Act, based almost verbatim on language proposed in the last few months of the long four year legislative struggle by an ad hoc committee of affected power and fishery interests. *See*, generally, Appendix D.

Throughout the 1980s the plight of the Pacific Northwest fisheries worsened, culminating in the recent listing of the Snake River sockeye salmon as an endangered species under the Endangered Species Act, 16 U.S.C. §§1531-44. 56 *Fed. Reg.* 58619 (November 20, 1991). Proceedings to list the Snake River spring and summer Chinook salmon as "threatened" have also been initiated. 56 *Fed. Reg.* 29542 (June 27, 1991). These developments portend even more drastic alterations of the power operations of the federal and non-federal dams in the Basin to protect those species, with almost certain resulting power losses. But just when the Act's compromise is most needed, the BPA has rewritten it by the erroneously restrictive interpretation at issue here, and a divided Ninth Circuit affirmed that action on a different, but equally erroneous basis. It is imperative that the innovative compensation provision be permitted to have a chance to work as Congress intended. This unique legislative approach to dealing with the "taking" implications of belated efforts to redress prior environmental neglect, thus avoiding flooding the courts

with difficult "takings" cases, is presently limited to the Columbia River Basin. However, it will undoubtedly be considered by other regions as a possible approach to their similar problems. For example, in California the proposed listing of the delta smelt as a "threatened" species under the Endangered Species Act (56 *Fed. Reg.* 50075 (October 3, 1991)) threatens to impair historic water use and diversions in the Sacramento and San Joaquin Delta, with serious repercussions elsewhere in the state.

The Ninth Circuit's decision affirming BPA's definition of "impose" in the compensation provision of section 4(h)(11)(A) should be reviewed and reversed by the Court because it:

> (1) distorts its plain meaning, conflicts with this Court's decisions applying the inverse condemnation doctrine, and produces an absurd result erroneously rewriting the historic compromise between fishery and power interests reflected in that section; and
>
> (2) applies a highly deferential standard of review to the BPA's interpretation even though that agency has a conceded substantial economic interest in that interpretation, which conflicts with the rule in the District of Columbia Circuit.

I. THE NINTH CIRCUIT'S INTERPRETATION OF THE PACIFIC NORTHWEST POWER ACT'S COMPENSATION PROVISION DISTORTS ITS PLAIN MEANING, CONFLICTS WITH THIS COURT'S DECISIONS APPLYING THE INVERSE CONDEMNATION DOCTRINE AND PRODUCES AN ABSURD RESULT

The word "imposed" in section 4(h)(11)(A) is not defined in the Act, presumably because Congress assumed that it has a commonly understood dictionary meaning. The *American Heritage Dictionary* (1985 ed., p. 646) lists five definitions (emphasis in original):

> 1. To establish or apply as compulsory; levy; *impose a tax.* 2. To apply or make prevail by or as if by authority; *impose a peace settlement.* 3. To obtrude or force (oneself, for example) upon another or others. 4. *Printing.* To arrange (type or plates) on an imposing stone. 5. To pass off on others. *He imposed a fraud on his company.*

Definitions 2, 3 and 5 plainly encompass what happened to the PUDs in 1987 and what will happen in the future when upstream federal dams release water to maintain minimum flows for fish protection, mitigation or enhancement. Even definition 1 is broad enough if "compulsory" is read in a non-legal sense, *i.e.*, as precluding a practical alternative course of action. *Webster's Third New International Dictionary* (1981) contains a similar array of broad definitions, as the dissent below recognized. 947 F.2d at 397.

BPA turned only to Black's Law Dictionary, which provides only two not unsurprisingly legally oriented definitions: "To levy or exact as by authority; to lay as a burden, tax, duty or charge." *See* page 10 *supra*. But even these definitions are broad enough to encompass the 1987 federal agency releases and similar releases in the future in that they "lay as a burden" on the PUDs the necessity for operational "measures" directly causing "monetary costs and power losses".

The BPA's interpretation assumes that Congress intended to compensate the non-federal projects for such losses *only* if they occurred as a direct result of some formal legal or administrative injunction directed against those specific projects. Not only is there no basis for such an assumption in the express language of the statute, its general purposes or its legislative history, but the BPA's cramped reading of "impose" runs counter to the basic concept of this Court's well established doctrine of inverse condemnation, namely that governmental actions may re-

sult in the "taking" of private property outside of the normal, authorized legal procedure of eminent domain or other administrative regulatory actions. The doctrine is best illustrated in *Dugan v. Rank*, 372 U.S. 609 (1963), involving the impairment of downstream water rights by the Bureau of Reclamation's operation of an upstream dam. Building on long established precedent, the Court made it clear that it is the cause and effect relationship between the federal agency action and the affected property rights that is controlling, regardless of the absence of any legal or administrative formalities by which it was accomplished (*id* at 625-26 (emphasis added)):

> Therefore, when the Government acted here 'with the purpose and effect of subordinating' the respondents' water rights to the Project's uses 'whenever it saw fit,' 'with the result of depriving the owner of its profitable use, (there was) the *imposition* of such a servitude (as) would constitute an appropriation of property for which compensation should be made.'

Similarly, in *United States v. Causby*, 328 U.S. 256, 261 (1945), the Court concluded that continuous flights by federal aircraft at low levels over private property resulted in a situation where the "[landowner's loss] would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."

What the BPA position boils down to is this: Assume that the 1987 low flow situation on the Columbia recurs, as it inevitably will, and the Council's "Fish Passage Managers" again determine a need for releases from the federal dams, either as provided in the Council's officially approved "Program" or, as in 1987, in excess of those amounts. If they then persuade the FERC to either issue an emergency order or institute proceedings against the downstream PUDs requiring them to release water from their reservoirs because of the increased flows and such

releases either exceed generating capacity or generate power that is not marketable, the PUDs will be eligible for compensation under the compensation provision. But if the Fish Passage Managers take no such formal action and simply request the Corps of Engineers to make the needed releases and let the downstream projects deal with the problem as best they can, the PUDs will not be eligible. There is absolutely no basis for interpreting "impose" to produce such an absurd result, which is obviously why the Ninth Circuit found it necessary to sustain the BPA's interpretation of the compensation provision on a different, but equally erroneous basis, to which we now turn.

Section 4(h)(11)(A) imposes two distinct duties on the federal agencies in carrying out their responsibilities under their authorizing legislation and other related laws: generally, to do so in a manner (1) consistent with the broad fish and wildlife protection, mitigation and enhancement "purposes of this Act and other applicable laws", and (2) specifically, to "take into account" the Council's fish and wildlife "program" in their decisionmaking. The compensation provision is triggered by actions resulting from "such consideration". The Ninth Circuit concluded that "such consideration" referred only to consideration of the Council's program because the compensation provision is located in subsection (ii). *See* pages 11-12 *supra*. Petitioner contends that the natural reading of "such consideration" in proper context also includes the mandated consideration of "the purposes of this Act and other applicable laws" in subsection (i). The first sentence of the section imposes a dual obligation, and there is no reason to restrict the second independent sentence of the section to only one of them. If Congress had so intended, it surely would have said so, particularly since subsection 4(h) was one of the most carefully considered sections of the Act.[3]

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[3] Rep. Swift, a sponsor of the legislation, stated during consideration of the bill that the fish and wildlife provisions were "carefully written"

The obverse conclusion from the court's reasoning is that if the compensation provision had not been located immediately after the last word in subsection (ii) but had been set off as an independent sentence it would reasonably be read as applying to both subsections (i) and (ii). Although petitioner does not agree that the location of the compensation provision should affect its unrestricted reference to both antecedent duties, any doubts could have been easily resolved by reference to the legislative history of the section. However, BPA relied only on two snippets from the extensive legislative history (App. at 35a) and the court did not consider it at all. Consequently, Appendix D to this petition is a summary of the legislative history of the fish and wildlife provisions of the Act. It plainly shows, *inter alia*, that the language which became section 4(h)(11)(A) was developed by an ad hoc committee of power and fishery interests with the compensation provision situated as a separate, concluding sentence to the subsection. It was offered as an amendment to S. 885 during the "markup" of that bill by the Water and Power Resources Subcommittee of the House Interior and Insular Affairs Committee, was accepted verbatim by the subcommittee (*id.* at 54a), and reported unamended and with the same structure by the full Committee, as follows (*id.* at 49a-50a (emphasis added)):

> (ii) exercise such responsibilities, taking into account at each relevant stage of decision-making processes to the fullest extent practicable, the program adopted by the Council under paragraph (1).
>
> *If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate and enhance fish and wildlife which are not at-*

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and "represent legislative craftsmanship at its very best. . . ." App. at 56a.

> *tributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with paragraph (2) of this subsection.*

Two days later H.R. 8157 was introduced, reflecting a compromise on a number of issues which had been treated differently by the Interior and Commerce committees, *except for subsection 4(h)*, which remained essentially unchanged from S. 885 as reported by the Interior Committee. For some unexplained reason, however, the compensation provision in H.R. 8157 was printed immediately after the last word in subsection (ii), as follows (*Id.* at 52a, emphasis added)):

> (ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under this subsection. *If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.*

Those members of the House who had been most instrumental in helping forge the compromise between the fish and power interests explained and extolled that effort and urged Congress to accept the compromise without change as those groups had written it. *Id.* at 52a-57a. Neither Rep. Lujan nor Rep. Dingell indicated that there had been any substantive change in the intent of the compensation provision as reported by the Interior Committee. Surely, if the protection afforded the non-federal projects in the original compromise language reported by the In-

terior Committee had been altered in H.R. 8157 in the way BPA and the Ninth Circuit now read it, it would have engendered vigorous opposition to the substitute bill. It did not, and the substitute bill was enacted with the structure of subsection 4(h)(11)(A)(ii) as shown in H.R. 8157 (*see* page 4 *supra*). Consequently, in light of that plain public record, petitioner believes that the most probable explanation for the altered location of the compensation provision is that it was a printing error.

But even this unfortunate error should not have led the majority to reach the conclusion it did. Because the compensation issue was addressed in the statute, the court should have aggressively sought out the Congressional intent within the four corners of the statute and its legislative history,[4] but it did not do so. Had it done so, it would have readily discovered that, as opposed to the false dichotomies which the BPA created in its interpretation of the words "measures" and "impose", the intended Congressional dichotomy was otherwise. It starts from the Act's preservation of (1) the existing authorities of the federal agencies "managing, operating or regulating" hydroelectric facilities in the Basin (App. at 51a, 57a) and (2) the outstanding FERC licenses held by the non-federal projects. Section 10(i), 16 U.S.C. § 839g(i). Under those authorities, the federal agencies, most notably the FERC, already had imposed on existing licensees or could in the future "impose" on new or relicensed projects measures for the protection, mitigation and enhancement of fish and wildlife, usually designed either to (1) prevent damage to fish and wildlife during project construction and operation, and (2) to mitigate unavoidable adverse impacts on fish by the construction of various kinds of facilities or the use of various operational measures, primarily releases to maintain minimum stream flows in certain migration sea-

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[4] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

sons. Such measures are site specific and address impacts "attributable to the development and operation of such projects", in the language of the compensation provision. The Act's disclaimer of any intent to affect rights and obligations under outstanding FERC licenses thus continued the duty of the licensees to carry out such measures and bear their attendant costs. But the Act also emphasized general "enhancement" of the fishery resource from its depleted state, the causes of which were not attributable to individual licensed projects, but to 40 years of federal dam construction, as well as irrigation, timbering, and other land use developments, *i.e.*, impacts "not attributable" to the non-federal projects. The non-federal project owners were opposed to bearing the costs of measures taken at their projects necessary to promote systemwide "enhancement" of the fishery resource. The compromise reflected in section 4(h)(10)(A) was to have BPA bear those enhancement costs, making it clear that such payments were to "be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law" (*see* page 4 *supra*), *e.g.*, the non-federal projects' obligations under their FERC licenses. BPA would then spread the costs among all the BPA customers. App. at 41a-43a, 53a.

The retained authority of the federal agencies to implement fish and wildlife measures independent of those formally included in the Council's "Program" is also important to an understanding of the compensation provision. Otherwise, necessary fish measures, such as the extra-Program releases by the Corps of Engineers in 1987, would be sacrificed because of procedural delays. In short, while the Council's "Program" was to be the focus for the systemwide effort mandated by the Act, the "measures" it incorporated were not to be the exclusive means for achieving fish and wildlife goals, as the decision below recognized.

The Ninth Circuit majority describes the 1987 Corps of Engineers' releases from Grand Coulee and Chief Joseph dams for minimum flow maintenance at the lower reaches of the Columbia River below the PUD dams as imposing only "passive burdens . . . such as release of additional water" and that "[n]o affirmative conduct was required of a non-federal hydroelectric project in order to put this plan in place". 947 F.2d at 392, 393. This is an astounding statement! It is pure sophistry to characterize the action that the PUDs took in making releases at their dams in response to those federal releases as other than "affirmative" action. The only other alternative was "no action", which would have led to flooding of their projects.

II. THE NINTH CIRCUIT'S APPLICATION OF A HIGHLY DEFERENTIAL STANDARD OF REVIEW TO BONNEVILLE POWER ADMINISTRATION'S INTERPRETATION OF THE COMPENSATION PROVISION OF THE ACT IN WHICH THAT AGENCY HAS A DIRECT AND SUBSTANTIAL FINANCIAL INTEREST IS IMPROPER AND CONFLICTS WITH THE RULE IN THE DISTRICT OF COLUMBIA CIRCUIT

The Bonneville Power Administration has a direct and substantial financial interest in the scope of the compensation provision of section 4(h)(11)(A), inasmuch as section 4(h)(10)(A) directs BPA to provide such compensation from the BPA Fund. BPA succinctly described the relationship of the compensation provision to its own operations in its "Notice of Intent to Develop Policies and Procedures for Compensating Costs and Power Losses at Non-Federal Electric Power Projects" issued May 4, 1983 (48 *Fed. Reg.* 20117, 20118):

> BPA recovers all of its revenue requirements through the marketing of electric power and related services. BPA compensation of costs and power losses at non-Federal electric power projects could affect both BPA's revenues requirements and the amount of power available to sell,

> which have a direct effect on BPA's electric power rates.

BPA, as a single purpose power marketing agency, is thus very different from a traditional federal regulatory agency, such as the Federal Energy Regulatory Commission, which has no direct or indirect financial interest in the regulatory program it administers. It is plainly in BPA's financial interest to minimize payments under section 4(h)(11)(A), which is the result of its interpretation under challenge here. In such a situation the District of Columbia Circuit recognizes that an "interested" agency's decision is entitled to little, if any, deference. In *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, *cert. denied*, 484 U.S. 869 (1987), Judge Bork's opinion listed three exceptions to the general rule affording some deference to an agency's interpretation of law, in that case a settlement agreement, where the legal issue is within its acknowledged area of expertise (*id.* at 1571 (emphasis added)):

> There may, of course, be circumstances in which deference would be inappropriate. If the agency's interpretation of a contract has vacillated, deference might give the agency license to act arbitrarily by making inconsistent decisions without justification. *See, e.g., Tennessee Gas Transmission Co. v. FERC*, 789 F.2d 61, 62-63 (D.C. Cir. 1986) (vacillation in agency rationale does not constitute reasoned decisionmaking); *cf. FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44, 70 L.Ed.2d 23 (1981) (consistency of an agency's interpretation of statute bears on the amount of deference given by courts). Or if the particular governing statute expresses Congress' intent that the courts should play a fully independent role in interpreting contracts in that field, the statute may indicate that no deference should be accorded to the agency's

> interpretation. *See, e.g., Local Union 1395, IBEW v. NLRB*, 797 F.2d 1027, 1030 (D.C. Cir. 1986) (no deference where labor statutes explicitly give courts an independent role in interpreting collective bargaining agreements). *In addition, if the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract.*

Here, not only is the legal issue raised by the unique compensation provision of the Act not within BPA's traditional area of expertise, *i.e.*, the allocation and pricing of power, but BPA has a substantial financial interest in its interpretation. It is not an impartial umpire "calling balls and strikes"[5] in a contest between regulated competitors or applicants for federal privileges—BPA has some money on the game! Plainly, its decision under the circumstances was not entitled to any deference, let alone the high degree of deference the Ninth Circuit applied. That argument was presented below,[6] but the court ignored it. A year earlier, however, in *California Energy Comm. v. Bonneville Power Administration*, 909 F.2d 1298, 1306 (9th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1682 (1991), it forthrightly stated that it disagreed with the D.C. Circuit's *National Fuel* rule.

To the best of petitioner's knowledge, this Court has never addressed the issue. Consequently, it should resolve the conflict between the Ninth and District of Columbia

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[5] *Scenic Hudson Pres. Conf. v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), *appeal after remand*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

[6] Opening Brief of Petitioner-Intervenors Puget Sound Power & Light Company and Portland General Electric Company (December 11, 1989) at 30-33; Reply Brief of Petitioner-Intervenors Puget Sound Power & Light Company, Portland General Electric Company and Pacificorp d/b/a/ Pacific Power & Light Company (February 6, 1990) at 1.

Circuits and provide some guidelines in this area. For example, should deference be accorded the Secretary of the Interior's interpretation of the royalty or other financial provisions of a federal mineral lease or other resource sale instruments (*e.g.*, timber sale contracts, grazing leases, water delivery contracts) which the Secretary usually has drafted, even though this Court has stated that in such commercial arrangements the United States ought to be treated as any other party to a contract?[7] The D.C. Circuit was recently confronted with that argument in a dispute over the royalty provisions of a federal coal lease, but was able to avoid deciding the issue.[8] Similarly, how much, if any, deference should be accorded the Secretary's interpretation of statutes, regulations, or legal instruments involved in disputes between Indian tribes and third parties, where the Secretary's administration of his trustee duties *vis-a-vis* Indian tribes may subject him to charges of breach of trust and the United States to financial liability for any proven breach? *See, e.g., United States v. Mitchell*, 463 U.S. 206, 224, 226 (1983) (statutes and regulations that "give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians . . . establish a fiduciary relationship . . .") ("Given the existenance of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.").

The issue is analogous to the narrow exception to the scope of review of informal adjudications set forth in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), which permits *de novo* review of agency action "when the action is adjudicatory in nature, and the agency fact-finding procedures are inadequate." *Id.* at 415. In this

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[7] *Lynch v. United States*, 292 U.S. 571 (1934); *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949, 951 (10th Cir. 1982).

[8] *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789, *cert. denied*, ___ U.S. ___, 111 S.Ct. 47, 48 (1990).

regard, at least one federal district court has concluded that the Secretary's trustee relationship to certain Indian tribes justified *de novo* review of three reservation boundary determinations affecting the water rights of the tribes and other non-Indians in the Colorado River:

> [T]he fact-finding procedures used to adjudicate the boundary did not comport with due process. The court notes that this conclusion is buttressed by its concern for both the appearance and reality of objectivity in decision-making. The appearance of objectivity is not furthered when the Secretary of the Interior acts as the arbiter of boundary disputes whose resolution has a massive impact on rights to Colorado River water and, at the same time, serves as trustee for three of the Indian tribes which have a significant stake in the outcome. *Cf. Porter v. Califano*, 592 F.2d [770,] 782-84 [(5th Cir. 1979)]. The need for the appearance of objectivity favors *de novo* determination by this court.

The Metropolitan Water District of Southern California v. United States, 628 F.Supp. 1018, 1025 (S.D. Calif. 1986), *reversed on other grounds*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub nom. California v. United States*, 490 U.S. 920 (1989); *see also Pickering v. Board of Education*, 391 U.S. 563, 578 n. 2 (1968) ("[w]e do not propose to blind ourselves to the obvious defects in the fact finding process occasioned by the board's multiple functioning *vis-a-vis* appellant.")

Finally, the court's stated reasons for deferring to BPA in this instance are plainly far off the mark:[9]

> We defer to the BPA for three reasons: "First, the enabling legislation is highly technical and

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[9] 947 F.2d at 390, *quoting Dept. of Water & Power v. BPA*, 759 F.2d 684, 691 (9th Cir. 1985).

> complex. Second, the agency was intimately involved in the drafting and consideration of the legislation, . . . [and third] Congress has, for nearly half a century, monitored BPA performance in electricity regulation and allocation."

With respect to the first reason, only the Act's power allocation and pricing provisions are arguably "highly technical and complex". The compensation provision of section 4(h)(11)(A) is relatively straightforward. Second, although BPA was "intimately involved in the drafting and consideration of the legislation", it is not clear that it was involved in the drafting of the compromise language that became section 4(h)(11)(A),[10] inasmuch as that provision could only burden BPA with additional costs associated with construction of facilities and releases for minimum flow maintenance beyond those BPA was already reluctantly bearing for the federal agencies. Third, although Congress may have "monitored BPA performance in electricity regulation and allocation" since 1937, the compensation provision is unique and presented BPA with an unprecedented set of difficult issues to resolve, as the questions posed in BPA's 1983 initial effort to implement that section vividly demonstrate. 48 *Fed. Reg.* 20119.

The court's rationale for applying a highly deferential standard of review also ignores BPA's vacillation in its several attempts to develop an interpretation of section 4(h)(11)(A). Its aborted 1983 effort did not reflect the narrow interpretation it has finally settled on, and its prior payment of the PUD's claims for 1987 power losses (page 9 *supra*) is wholly at odds with its final 1989 rule. Thus BPA's track record on its nine year delay in issuing regulations to implement section 4(h)(11)(A) reflects "a path of such tortured vacillation and indecision" that "deference

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[10] Rep. Lujan's description of the ad hoc committee that drafted the compensation provision does not mention BPA or any other federal power agencies. App at 55a.

by the courts" is not justified. *Secretary of the Interior v. California*, 464 U.S. 312, 320 n. 6 (1984). Indeed, it is difficult to justify giving its current interpretation much, if any, deference under the circumstances, let alone the high degree of deference it received below.[11]

CONCLUSION

Petitioner respectfully requests that its petition for a writ of certiorari be granted and the Ninth Circuit's decision on the questions presented be reversed.

Respectfully submitted,

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January 15, 1992

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[11] The deference afforded a BPA *ratemaking* decision by this Court in *Aluminum Company of America*, page 5 *supra*, rested not only on the complex nature of the subject matter but also on the fact that "[f]ollowing enactment of the statute, the agency *immediately interpreted* the statute in the manner now under challenge . . . 'a contemporary construction'. . . .". 467 U.S. at 390 (emphasis added). That is not this case.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT.

No. 89-70381.

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY; Public Utility District No. 1 of Chelan County; Public Utility District No. 2 of Grant County, Petitioners,

and

Puget Sound Power & Light Company and Portland General Electric Company, Petitioners-Intervenors,

v.

BONNEVILLE POWER ADMINISTRATION, Respondent.

Argued and Submitted June 8, 1990.
Decided Oct. 17, 1991.

Carol Wardell and Ray A. Foianini, Ephrata, Wash., for petitioners.

Harvard P. Spigal, General Counsel, and Robert B. Ross, Asst. U.S. Atty., D.Or., Portland, Or., for respondent.

Sherilyn Peterson, Perkins Coie, Bellevue, Wash., and J. Jeffrey Dudley, Portland General Elec. Co., Portland, Or., for intervenors.

Petition for Review of a Decision of the Bonneville Power Administration.

Before HALL, THOMPSON and LEAVY, Circuit Judges.

LEAVY, Circuit Judge:

The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839-839h (1988), commonly known as the Northwest Power Act (the Act), authorized the States of Idaho, Montana, Oregon and Washington to enter into an interstate compact to create a policy-making and planning body for the management of electrical power and the preservation of fish and wildlife in the Columbia River Basin. The Pacific Northwest Electric Power and Conservation Planning Council (the Council) resulted. 16 U.S.C. § 839b.

The Act directed the Council to develop a Columbia River Basin Fish and Wildlife Program (the Program). 16 U.S.C. § 839b(h)(1)(A). The Program is implemented by the Bonneville Power Administration (BPA), the Corps of Engineers, the Bureau of Reclamation, and the Federal Energy Regulatory Commission (FERC) and its licensees. *See* Columbia River Basin Fish and Wildlife Program, as amended Feb. 11, 1987, (1987 Program) at § 104.

As part of its Program, the Council adopted a water budget that provides for additional releases of water from federal dams each spring to facilitate the migration of juvenile salmon and steelhead to the ocean. 1987 Program at § 300. The water budget limits water releases to 140 kcfs in that portion of the Columbia River upstream from the inflow of the Snake River, measured at Priest Rapids Dam. 1987 Program at § 302.

During the 1987 water budget period, the Corps of Engineers released in excess of 140 kcfs from the reservoirs at the Grand Coulee and Chief Joseph Dams, which are upstream from the Snake River inflow. These releases were made pursuant to a request by the Fish Passage Center, an office established by the Council for the management and operation of the annual water budget. 1987 Program § 303(b). The additional water was needed to assist juvenile salmon and steelhead to reach the ocean because of un-

usually low flows in the Snake River. As a result of the increased flows, four of the five mid-Columbia non-federal hydroelectric dams were required to spill water because the flow rates exceeded the hydraulic capacity of available generators.

The Act entitles non-federal electric power projects on the Columbia River and its tributaries to compensation for monetary costs and power losses resulting from "measures to protect, mitigate, and enhance fish and wildlife" which are "impose[d]" on the non-federal projects by federal agencies and which are "not attributable to the development and operation of such project[.]" 16 U.S.C. § 839b(h)(11)(A)(ii). In July 1987, the BPA received the first claims for compensation pursuant to the Act, for losses incurred as a result of the additional release of water that spring. Douglas County PUD claimed a loss of 2,087 megawatt hours of electricity; Chelan PUD claimed a loss of $195,870; and Grant PUD claimed a loss of $591,279. *See* Final Policy, 54 Fed.Reg. 31,074, 31,075 (1989). In 1989, the BPA negotiated settlements with these three PUDs. Douglas County PUD received 1,315 megawatt hours of energy; Chelan PUD received $163,134; and Grant PUD received $451,495. *Id.*

A draft policy for handling future compensation claims was published for public comment in the Federal Register on June 10, 1988. 53 Fed.Reg. 21,888 (1988). The BPA received comments from numerous individuals and entities, including the PUDs and the intervenors. The policy was published in its final form on July 26, 1989. 54 Fed.Reg. 31,074 (1989). It was declared effective August 28, 1989. The Final Policy states that the claims of the Douglas County, Chelan, and Grant PUDs will not form a precedent for future compensation decisions. *See* Final Policy, 54 Fed.Reg., at 31,074 [hereinafter "Final Policy"].

At issue in this case are definitions provided by the BPA in the Final Policy; specifically, the definitions of

"measure" and "impose." Those terms are found in that portion of the Act that provides for compensation to non-federal hydroelectric projects under certain circumstances:

> The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—
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> . . . .
>
> (ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under this subsection. If, and to the extent that, such other Federal agencies as a result of such consideration *impose* upon any non-Federal electric power project *measures* to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.

16 U.S.C. § 839b(h)(11)(A)(ii) (emphasis added).

The PUDs and intervenors contend the Final Policy adopted by the BPA for implementation of the Program is unreasonable and contrary to the Act because it improperly limits the meaning of "measure" and "impose" so as to nullify, or at least unreasonably restrict, compensation rights to which they otherwise would be entitled.

We have jurisdiction under 16 U.S.C. § 839f(e)(5).[1] We affirm in part and reverse in part.

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[1] We note that the case is ripe for review and the parties have standing. The " 'essential facts establishing the right to declaratory relief have already occurred' ": the agency action is final and the issues are legal ones. *See Central Montana Elec. Power Coop., Inc. v. Administrator of Bonneville Power Admin.*, 840 F.2d 1472, 1474 (9th

ANALYSIS

Standard of Review

Section 839f(e)(2) of the Act allows the BPA's interpretation of the Act to be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations; or short of statutory right. *See* 5 U.S.C. § 706(2)(A), (C) & (E) (1988). "This standard of review is highly deferential and assumes the agency action to be valid." *Department of Water & Power of Los Angeles v. Bonneville Power Admin.*, 759 F.2d 684, 690 (9th Cir.1985) (citations omitted). "We accord substantial deference to the interpretation given statutes by the officers or agencies charged with their administration." *Central Montana Elec. Power Coop., Inc. v. Administrator of the Bonneville Power Admin.*, 840 F.2d 1472, 1476 (9th Cir.1988); *see Aluminum Co. of Am. v. Bonneville Power Admin.*, 903 F.2d 585, 590 (9th Cir.1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 672, 112 L.Ed.2d 665 (1991). We defer to the BPA for three reasons: "First, the enabling legislation is highly technical and complex. Second, the agency was intimately involved in the drafting and consideration of the legislation, . . . [and third] Congress has, for nearly half a century, monitored BPA performance in electricity regulation and al-

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Cir.1988) (quoting *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 893 (9th Cir.1986)); *Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir. 1978). The PUDs allege a real and immediate threatened injury. *See Pence*, 586 F.2d at 736-38. They experienced economic losses from the 1987 water flow and have reason to expect similar losses in the future. The intervenors also allege sufficient injury. They allege (1) that as significant purchasers of power from the PUDs, their costs are affected by uncompensated PUD losses; and (2) that under certain circumstances they have the right to obtain compensation for monetary costs and power losses under the Act. While we express no opinion as to the intervenors' right to compensation under the Act, for the purpose of standing we accept their uncontested allegations as true and find them sufficient to establish standing. *See Portland Gen. Elec. Co. v. Johnson*, 754 F.2d 1475, 1480 (9th Cir.1985).

location." *Department of Water & Power,* 759 F.2d at 691; *see Utility Reform Project v. Bonneville Power Admin.,* 869 F.2d 437 at 442 (9th Cir.1989). In the final analysis, however, it is the obligation of the court to construe the statute. *Central Montana,* 840 F.2d at 1477.

A. Statutory Construction: "Measure"

The Final Policy defines "measure" as

> a specific provision in the Program, as contemplated in the Northwest Power Act, calling upon a Federal agency or other entity to undertake actions to protect, mitigate, and enhance fish and wildlife in the Basin.

Final Policy, at 31,075.

The PUDs and the intervenors argue the BPA's definition of "measure" impermissibly narrows the scope of compensation to exclude measures taken in consideration of the Program but not explicitly required by it. We agree that the BPA erred in the Final Policy when it decided that only those measures specifically described in the Program are compensable.

In construing the Act, we look first to the statute's language. *California ex. rel. State Water Resources Bd. v. FERC,* 877 F.2d 743, 746 (9th Cir.1989), *aff'd,* ___ U.S. ___, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990); *Pacificorp v. Bonneville Power Admin.,* 856 F.2d 94, 96 (9th Cir.1988). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

To define the meaning of "measure," we must read the language of paragraph (ii) of section 839b(h)(11)(A) in context. Title 16 U.S.C. § 839b(d)(1) of the Act requires the Council to prepare, adopt, and transmit to the Administrator a regional conservation and electric power plan. The

Act requires that the plan give first priority to conservation, second priority to renewable resources, third priority to generating resources of the highest possible efficiency, and fourth priority to all other resources. 16 U.S.C. § 839b(e)(1). The plan must include seven elements, including "the *program* adopted pursuant to subsection (h)." 16 U.S.C. § 839b(e)(3)F). The program subsection (h) refers to is 16 U.S.C. § 839b(h)(1)(A), which states: "The Council shall promptly develop and adopt, pursuant to this subsection, a *program* to protect, mitigate, and enhance fish and wildlife . . . on the Columbia River and its tributaries." (Emphasis added.) The Council is required to request recommendations for "measures which can be expected to be implemented . . . to protect, mitigate, and enhance fish and wildlife . . . affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries[.]" 16 U.S.C. § 839b(h)(2)(A). Then, the Act states that the Council shall develop a program on the basis of those recommendations and other information, and that "The program shall consist of measures to protect, mitigate, and enhance fish and wildlife affected by the development, operation, and management of such [hydroelectric facilities on the Columbia River and its tributaries.]" 16 U.S.C. § 839b(h)(5). The Act goes on to state "The Council shall include in the program *measures*" which will meet five listed objectives. 16 U.S.C. § 839b(h)(6). The Council is then required to consider, in developing its program, certain listed principles, including

> To the extent the program provides for coordination of *its* measures with *additional* measures (including additional enhancement measures to deal with impacts caused by factors other than the development and operation of electric power facilities and programs), such *additional measures are to be implemented* in accordance with agreements among the appropriate parties providing for the administration and funding of such additional measures.

16 U.S.C. § 839b(h)(8)(C) (emphasis added). This last section makes it clear that there are measures other than those listed in the program that are recognized as necessary to the protection, mitigation, and enhancement of fish and wildlife and which are contemplated by the regional conservation and electric power plan.

The Act requires that

> The Administrator and other Federal agencies responsible for managing, operating or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—exercise such responsibilities consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife. . . .

16 U.S.C. § 839b(h)(11)(A)(i). In addition, the Administrator and other Federal agencies are directed to, in the "exercise of such responsibilities, tak[e] into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the *program* adopted by the Council. . . ." 16 U.S.C. § 839b(h)(11)(A)(ii) (emphasis added). This clearly does not mean the Administrator and other agencies are *limited* to the program in exercising their responsibilities under the Act. In addition to other factors, they simply must take it into account.

As we interpret the 16 U.S.C. § 839b(h)(11)(A) of the Act and the 1987 Program, the release of water in the spring to enhance the outmigration of juvenile salmon and steelhead, even a release of water in excess of the Water Budget, is a measure. All that section 839b(h)(11)(A) requires is that a measure be something that results from a federal agency taking the Program into consideration at each relevant stage of the decision-making processes, in exercising their responsibilities consistent with the Act and other applicable law.

Moreover, the Program itself consists of more than its listed measures. In addition to measures, which BPA and

other federal agencies implement to protect, mitigate, and enhance fish and wildlife affected by hydroelectric dams, there are also objectives for developing and operating dams in a way designed to protect, mitigate, and enhance fish and wildlife, and coordination of fish and wildlife management, research and development. 1987 Program, section 102a-c, at 20. The Program recognizes that "if all the measures in the current program were implemented, they still would be unlikely to achieve the goal of doubling runs." 1987 Program, at 12. Thus, the Program sets forth "seven policies and a planning process for selecting *new* measures to add to the program." *Id.* Among these, efforts may be taken to "Accelerate actions to increase mainstem survival of fish" and to "Increase production through a variety of methods." *Id.* Simply put, factors in addition to the listed Program measures must be taken into account in the decisionmaking process. Both the Act and the 1987 Program recognize that this flexibility must be given to the Administrator and the other federal agencies.

Therefore, we reject the BPA's artifical dichotomy between a "Program measure" and a "non-Program measure." The Act is sufficiently clear that if, after considering the Program, something needs to be done by a federal agency to enhance fish survival, that is a measure, whether it is listed or not. Section 839b(h)(11)(A)(ii) does not limit compensable measures to those measures mentioned specifically in the Program.

B. Statutory Construction: "Impose"

The PUDs and intervenors also take exception to the BPA's definition of the phrase "impose upon" in section 839b(h)(11)(A)(ii). Under the definition, there is compensation only if some affirmative action is required of the non-federal projects "pursuant to an order issued by a Federal agency by force of regulation or law." Final Policy, at 31,075. The PUDs and intervenors contend the phrase includes within its ambit those actions which impose

upon the non-federal projects passive burdens as well, such as the release of additional water. We affirm the BPA's interpretation of "impose upon."

Section 2(F) of the BPA's Final Policy contains the following definition:

> "Impose" or "imposition" refers to the act of applying fish and wildlife obligations or restrictions upon a claimant which the claimant must implement in order to comply with applicable Federal law, regulation, or order.

Id.

Paragraph (ii) of section 839b(h)(11)(A) must be considered in conjunction with paragraph (i) to understand Congress' intent. The entire section reads:

(A) The Administrator [of the Bonneville Power Administration, *see* 16 U.S.C. § 839a(2)] and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—

> (i) exercise such responsibilities consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated;
> (ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under this subsection. If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to

> the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.

This section applies to all federal agencies responsible for managing, operating, or regulating hydroelectric facilities.

Paragraph (i) is all-inclusive as to what an agency must consider to protect, mitigate, and enhance fish and wildlife: the Act, the Program, and other applicable law. If an agency does what is required by paragraph (i), there is no duty for the Administrator to bear the costs or losses to the non-federal projects, because the paragraph contains no provision contemplating that a non-federal project may be ordered to protect, mitigate, and enhance fish and wildlife through measures "which are not attributable to the development and operation of such project."

Under paragraph (ii) the agencies must exercise their responsibilities by taking into account in their decisionmaking processes the program adopted by the Council. In contrast to paragraph (i), it is contemplated that in their decisionmaking they will impose measures on non-federal hydroelectric projects, and that the measures will not be attributable to the development and operation of the project. If the agency imposes measures not attributable to the development and operation of the project, the Administrator must bear the losses or costs to that project.

In our case, the Corps of Engineers released additional water at Grand Coulee Dam and Chief Joseph Dam to assist juvenile salmon and steelhead on their journey to the ocean. While we do not know under what authority the Corps released the water, it could have exercised that responsibility under paragraph (i), in which event there can be no plausible claim for compensation. No affirmative conduct was required of a non-federal hydroelectric project in order to put this plan in place.

A federal agency acting under paragraph (ii) is not just exercising its responsibility consistent with the Act, as called for by paragraph (i), but instead is taking into account the Program adopted by the Council when it imposes some measure on a non-federal project to "protect, mitigate, and enhance fish and wildlife," and that measure is not attributable to the development and operation of the project. The measure is then presumably carried out by the non-federal project.

It is our view that any losses to a non-federal project as a result of direct action by a federal agency such as the Corps under paragraph (i) is not compensable because that paragraph does not require compensation. Federal action under paragraph (ii), on the other hand, contemplates the imposition of a measure on the non-federal hydroelectric project. The project must then itself carry out the measure to protect, mitigate, and enhance fish and wildlife, and the Administrator must compensate the project. Thus we find the BPA's definition of "impose" entirely reasonable in terms of the statue because it recognizes this important difference between the two paragraphs in section 839b(h)(11)(A).

The dissent argues that FERC is the only federal agency authorized to require non-federal projects to take affirmative action. The import of this argument is that because paragraph (ii) speaks of multiple federal agencies imposing measures, Congress cannot have meant that compensation is due only when affirmative conduct is required.

We cannot agree. FERC is not the only federal agency that can require non-federal hydroelectric projects to take affirmative action to enhance fish and wildlife.

16 U.S.C. §§ 803(a) and (b) (1988 & Supp. 1990), cited by the dissent for the proposition that only the FERC can require affirmative conduct, deal only with the conditions

for *licensing* electric power projects.[2] However, the licensing of hydroelectric facilities is not the extent of government regulation of non-federal projects on the Columbia

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[2] Sections 803(a) and (b) (1988 & Supp.1990) state:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(2) In order to ensure that the project adopted will be best adapted to the comprehensive plan described in paragraph (1), the Commission shall consider each of the following:

(A) The extent to which the project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by—

(i) an agency established pursuant to Federal law that has the authority to prepare such a plan; or

(ii) The State in which the facility is or will be located.

(B) The recommendations of Federal and State agencies, exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located, and the recommendations (including fish and wildlife recommendations) of Indian tribes affected by the project.

(C) In the case of a State or municipal applicant, or an applicant which is primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small

River: federal agencies other than FERC, most notably the Corps of Engineers, are involved in regulating private electric utilities in areas other than licensing.

A federal district court and a federal appellate court have held that section 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344, requires a non-federal utility to obtain a permit from the Secretary of the Army to discharge dredged or fill materials from any source into the Nation's waters. *Scenic Hudson Preservation Conference v. Callaway,* 370 F.Supp. 162, 171-72 (S.D.N.Y.1973), *aff'd,* 499 F.2d 127 (2d Cir.1974).[3] The district court decided this issue after first holding that the Corps could not issue permits for the construction of hydroelectric projects because the Federal Power Act preempted the Corps' authority in the licensing of such projects. The dissent focuses only on the first issue.

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power production facilities), the electricity consumption efficiency improvement program of the applicant, including its plans, performance and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of relevant State regulatory authorities applicable to such applicant.

(3) Upon receipt of an application for a license, the Commission shall solicit recommendations from the agencies and Indian tribes identified in subparagraphs (A) and (B) of paragraph (2) for proposed terms and conditions for the Commission's consideration for inclusion in the license.

(b) Alterations in public works: That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

[3] This circuit has recognized the Corps' authority to issue permits for dredge and fill operations. *See Friends of the Earth v. U.S. Navy,* 841 F.2d 927, 929 (9th Cir.1988) ("the Navy must obtain from the Army Corps of Engineers a '404 permit' before it may discharge dredged or fill material into the navigable waters of the United States").

The issue that arose in *Scenic Hudson* was whether a Corps permit was required for the discharge of dredge and fill material incidental to hydroelectric construction despite prior licensure by the forerunner of FERC, the Federal Power Commission (FPC). In deciding that a permit was required from the Corps, the courts rejected the argument that "Congress could not have intended to interfere with the jurisdiction of the FPC in view of the long settled policy . . . of allowing that agency unique control over the production of hydroelectric power." *Id.* at 170. The D.C. Circuit has adopted the reasoning of *Scenic Hudson*, observing that FERC's jurisdiction over hydroelectric projects is not exclusive:

> It follows that although the Department of Energy Organization Act undoubtedly endowed FERC richly with authority, it did not expand the jurisdiction it derived from its predecessor so as to preclude the Secretary of the Army from exerting his powers over the Nation's navigable waters.

Monongahela Power Co. v. Marsh, 809 F.2d 41, 48 (D.C.Cir.) (footnotes omitted), *cert. denied*, 484 U.S. 816, 108 S.Ct. 68, 98 L.Ed.2d 32 (1987). The D.C. Circuit also recognized why *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 182, 66 S.Ct. 906, 920, 90 L.Ed. 1143 (1946) does not stand for the proposition that FERC's powers are exclusive:

> In *First Iowa* . . . the [Supreme] Court sustained FPC's jurisdiction against state regulation, holding that the federal power preempted conflicting state policy. 328 U.S. at 182 [66 S.Ct. at 920]. This cannot be reliably extrapolated to the proposition that FPC's jurisdiction was exclusive with respect to another federal agency [i.e., the Corps] whose relevant powers were conferred long thereafter, and whose primary statutory mission implicates very different objectives.

Monongahela Power Co., 809 F.2d at 48 n.75. Moreover, FERC itself recognizes that it has concurrent jurisdiction with other federal agencies as well as the states over hydroelectric development. *Henwood Associates Inc., Project No. 8142-016,* 51 FERC ¶ 61,549, at 61,558 n. 49 (1990).

Thus, for dredge and fill operations, the Corps has authority to impose upon a private utility both the requirement of a permit and the necessity of abiding by the Corp's conditions.[4] This is certainly affirmative conduct, and it may involve implementing measures for fish and wildlife enhancement.

The Corps' authority to require affirmative conduct, in some cases to enhance fish and wildlife, from non-federal hydroelectric projects is not limited to dredge and fill permits. The Corps also issues permits for dams and dikes in the navigable waters of the United States, and issues permits for structures or work in or affecting such navigable waters. 33 C.F.R. pts. 321, 322 (1990). The Corps also has significant procedures for implementing the National Environmental Policy Act (NEPA). *See* 33 C.F.R. pt. 230 (1990). The Corps may require affirmative conduct from private utilities in its permit processes and in its NEPA procedures.

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[4] In the permit process, the Secretary of the Army acts through the Chief of Engineers of the Corps, who may or may not issue permits after a public hearing. 33 U.S.C. § 1344(a), (d). In conjunction with guidelines developed by the Administrator of the Environmental Protection Agency (EPA), the Secretary of the Army, through the Chief of Engineers of the Corps, specifies the disposal site for such materials if it grants a permit. 33 U.S.C. § 1344(b). The disposal sites are examined specifically for any adverse effects upon fish and wildlife. 33 U.S.C. § 1344(c). The Administrator of the EPA may prohibit the specification of any area as a disposal site if he or she determines that the disposal will have an adverse effect on, among other things, fish and wildlife. 33 U.S.C. § 1344(c). Requirements may be imposed when a discharge permit is granted. 33 U.S.C. § 1344(e)(1)(B).

Thus, in the process of "imposing" measures the FERC is not the only agency that may require a non-federal electric power project to take affirmative steps. The BPA recognizes, as do we, that Congress intended that agencies other than FERC may direct or require non-federal electric power projects to take affirmative action to preserve fish and wildlife. The BPA's interpretation of "impose" in 16 U.S.C. § 839b(h)(11)(A)(ii) to include only the affirmative conduct required of non-federal utilities by federal agencies is not inconsistent with the language of the statute, and is therefore reasonable.

C. Claim Procedures

1. Waiver

Section 5 of the Final Policy requires the Administrator to review compensation claims to determine if the right to compensation has been waived. Final Policy (II.5.A.), at 31,076. The PUDs argue that the statute does not include a waiver limitation. However, nothing in the statute suggests that a non-federal project cannot waive its right to compensation. The waiver provision in the Final Policy represents a reasonable construction of the Act by the BPA. We give deference to that construction and approve it.

2. BPA Offset

The intervenors argue that, although the Act provides for reimbursement of losses to the extent that they result from measures imposed by federal agencies, the BPA procedure in the Final Policy impermissibly requires claimants to make an affirmative showing that the BPA is not entitled to an offset. *See id.* (II.5.C.). We reject this argument. There is nothing unreasonable about the BPA's interpretation requiring mitigation, offsets for benefits received, and offsets for exacerbation of losses by a claimant. We give deference to the BPA's construction of the Act

in adopting these provisions in the Final Policy and we approve them.

3. Licensees

In the Final Policy, the BPA defines a permissible claimant as "any non-Federal hydroelectric power project licensee requesting compensation under this policy." Final Policy (II.2.A.), at 31,075. However, if "a utility which is not a licensee can show that it has rights in a project which could not be represented by the project's licensee," the nonlicensee may petition the Administrator for permission to file a claim. *Id.* (II.3.A.).

The intervenors argue that the Act applies to anyone who can show such costs or power losses. It is not unreasonable for the BPA to limit claimants to licensees. The licensees receive the direct burdens and are an easily identifiable and limited class.

Further, the Act only refers to losses incurred by "any non-Federal electric power project;" it does not refer to other entities, such as these utilities who purchase power from the non-federal projects. Nevertheless, the Final Policy provides non-licensees an opportunity to show that a nonlicensee's rights could not be represented by the licensee.

The BPA's definition of a permissible claimant and provision for nonlicensee claims are reasonable. We approve them.

4. Time Limits

The Final Policy requires all claims to be submitted within 120 days after a loss occurs. Final Policy (II.4.A.), at 31,075. The intervenors claim that this time period is insufficient to identify and assess losses and that 120 days is unreasonable and arbitrary.

Some time limit is appropriate. The BPA must conduct its affairs in a businesslike manner. 16 U.S.C. § 839f(b)

(1988). It must be able to budget for these uncertain costs, investigate the claims while the claims are still fresh, and be able to take prompt action to avoid further loses.

Absent proof that the 120-day limit is unreasonable in a particular context, we defer to the BPA's adoption of the 120-day limit and approve it.

5. Prior Notice

The intervenors argue that section 3(b) of the Final Policy is impermissibly vague and burdensome. The provision requires that "When any licensee of a non-Federal project becomes aware that a Federal agency may take or has taken an action which may form the basis of a claim, it should promptly notify that agency and the Administrator." Final Policy (II.3.B.), at 31,075.

We see nothing unreasonable about this notice requirement. Prompt notice may avoid an anticipated loss. It also permits early investigation and expeditious handling of claims for losses which have occurred. The notice provision is reasonable.

6. Direct Causation of Losses

The intervenors argue that the BPA's Final Policy incorrectly limits recovery for costs and losses to those "directly" caused by or resulting from a measure. Absent more specific BPA definition or implementation of this "directness" requirement, it is unclear whether such a requirement is unreasonable. Some causation nexus is required by the Act, which limits compensation to "resulting" losses.

On the face of it, the BPA's "directness" requirement seems reasonable. However, it is conceivable that this requirement could be interpreted or implemented in an unreasonable manner. Given the posture of the present case, however, the intervenors' concern is hypothetical. There is no contention that the BPA has interpreted or imple-

mented its "directness" requirement in an unreasonable manner. Accordingly, the issue presented by the intervenors relating to the Final Policy's "directness" requirement is unripe for judicial review.

Agency action AFFIRMED in part and REVERSED in part. Each party shall bear its own costs on appeal.

THOMPSON, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority opinion except as to that portion headed "D. Statutory Construction: 'Impose'." In my view, the Bonneville Power Administration's definition of "impose upon" is unreasonable.

I agree with the BPA that the statutory language initially suggests that, to be entitled to compensation, the non-federal projects must be forced to take affirmative action. According to Webster's Third New International Dictionary (1981), "impose upon" is defined: "to force oneself esp. obnoxiously on (others)" or "to take unwarranted advantage of." "Impose" can mean "to cause to be burdened" or to force one to submit to something. *Id.* The Act requires compensation only where *measures* are imposed upon the non-federal projects, not merely burdens, or costs. 16 U.S.C. § 839b(h)(11)(A)(ii) (1988) ("other Federal agencies . . . impose upon any non-Federal electric power project measures. . . ."). The BPA can therefore find some support in the statutory text for its interpretation.

Nevertheless, I still believe the BPA interpretation is unreasonable. The Act provides that, "If, and to the extent that, such other Federal *agencies*" impose measures, compensation will be provided. 16 U.S.C. § 839b(h)(11)(A)(ii) (1988) (emphasis added). The term "agencies" is plural, indicating that more than one agency has the authority to impose the measures made compensable by section 839b(h)(11)(A)(ii).

Therein lies the rub. The Act expressly contemplates that several agencies can impose compensable measures, but only one agency—FERC—has the authority to require non-federal projects to take *affirmative* action. *See* 16 U.S.C. 803(a) & (b) (1988 and 1990 Supp.); *see also First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 182, 66 S.Ct. 906, 920, 90 L.Ed. 1143 (1946); *Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162, 166-67 (S.D.N.Y.1973), *aff'd* 499 F.2d 127 (2d Cir.1974). Thus, in order to affirm BPA's interpretation we would have to believe Congress intended to silently change its longstanding position which accorded FERC exclusive control over the licenses of non-federal hydroelectric projects. *See Northwest Paper Co. v. Federal Power Comm'n*, 344 F.2d 47, 51 (8th Cir.1965) (referring to Congress' "intention to centralize the authority over . . . [water power] resources in one Government agency."); *Scenic Hudson*, 370 F.Supp. at 166 (" 'It seems clear that it was the purpose of Congress to bring under this Act all future power development within the jurisdiction of the United States and to concentrate [it] in the hands of the Federal Power Commission [now FERC] . . .' ") (quoting 32 Op. Atty.Gen. 525, 528 (1921)). I do not think Congress so intended. I therefore would reverse BPA's interpretation of the statutory term "impose upon."

APPENDIX B

54 Federal Register 31074-76
July 26, 1989

DEPARTMENT OF ENERGY

Bonneville Power Administration

Final Policy for Compensating Non-Federal Hydroelectric Projects for Monetary Costs and Power Losses Caused By Federal Agency Actions To Implement Columbia River Basin Fish and Wildlife Program Measures

AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Issuance of BPA's policy to provide compensation for costs resulting from fish and wildlife program measures and announcement of the availability of a document describing the Administrator's decision.

SUMMARY: BPA finalized its Compensation Policy (Policy) for the Implementation of Columbia River Basin Fish and Wildlife Program measures. The Policy was established pursuant to section 4(h)(11)(A)(ii) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act). BPA published a draft policy for public comment in the **Federal Register** on June 11, 1988 (53 FR 21888). We received comments from 24 individuals and entities.

Issuance of the Policy completes a policy and process to address claims filed by non-Federal project operators for compensation for monetary costs and power losses due to Federal agency actions to implement the Program. The Program, adopted by the Northwest Power Planning Council (Council), provides for various actions to protect, mitigate, and enhance Columbia River Basin fish and wildlife. BPA's decision document containing its responses to public comment is available from BPA's Public Involvement Office.

DATE: The Policy is effective August 28, 1989.

SUPPLEMENTARY INFORMATION:

I. Background Information

Section 4(h)(11)(A) of the Northwest Power Act provides:

> The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River and its tributaries shall * * * (ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under this subsection. If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.

The Northwest Power Act does not establish specific procedures or standards to guide BPA in compensating non-Federal project operators for costs or power losses resulting from actions imposed by Federal agencies pursuant to the Northwest Power Act. Based on inquiries from several Public Utility Districts, in May 1983 BPA published a notice of our intent to enter into rulemaking to develop policies and procedures to compensate non-Federal project operators. We sought comments from interested parties.

In 1985, based on our extensive review of the comments, we determined the development of a compensation policy would be premature. Since passage of the Northwest Power Act in 1980, and adoption of the Program by the Council in 1982, BPA had not received any claims. Given these circumstances BPA concluded that we could not anticipate

the issues that would be raised by claims. Nor could we anticipate the procedures necessary to review and address claims.

BPA did not receive any compensation claims until July 1987. At that time BPA received three claims, all based upon Federal water releases in May and June of 1987. These claims were filed by the Public Utility District No. 1 of Douglas County (Douglas PUD) on July 29, 1987; the Public Utility District No. 1 of Chelan County (Chelan PUD) on October 5, 1987; and the Public Utility District of Grant County (Grant PUD) on November 25, 1987.

In our June 1988 **Federal Register** Notice, we indicated that we would implement a compensation policy before processing these claims. However, we have chosen to address the claims independent of this Policy. Preceding this Policy, the actions of the U.S. Army Corps of Engineers (Corps), the Council, and the claimants in 1987 reflect a unique circumstance requiring separate consideration. Had this Policy been in place, and considered by the Council, Corps, and claimants, we believe the actions which led to the three 1987 claims may not have been taken or may have been different. Consequently, the terms and conditions set forth in this Policy may not be fairly applicable to those claims. However, any decisions we made concerning those claims will not form a precedent for future compensation decisions concluded under the Policy.

BPA reached negotiated settlements with the three Mid-Columbia PUDs during late January and early February 1989. All settlements were for lesser amounts of energy or money than originally claimed. Settlement discussions centered on two issues: (1) The value of the energy spilled, and (2) a comparison of the operations the PUDs actually undertook against the hypothetical operations that could have been taken under the Corps' Coordinated Plan of Operation which would have minimized the PUDs' losses.

Douglas County PUD had claimed a loss of 2,087 megawatt hours and agreed to a settlement whereby BPA would deliver 1,315 megawatt hours of energy to Douglas during the 1989 Water Budget period when a Water Budget request would be in effect. Chelan PUD's claim was for 13,058 megawatt hours. Assuming an average price of 15 mills per kilowatthour, the value of the claim would be $195,870. BPA and Chelan settled for a $163,134 payment from BPA to Chelan. Grant PUD's claim was for $591,279 and was settled with BPA paying $451,495. Any decisions BPA made concerning the 1987 claims will not form a precedent for future compensation decisions made pursuant to this Policy.

Summary of Issues

The Administrator's decision document on the Compensation Policy will be sent to all commenters. It addresses the following general issues which were raised in our June 1988 **Federal Register** Notice and in the comments we received. * * *

* * *

Based upon the comments received and further examination of the issues, we have made several substantive changes in the Policy:

* * *

2. Any Federal agency proposing to implement a Program measure which may result in a claim should consult with interested parties and coordinate actions with BPA in advance, as provided in section 4(h)(11)(B) of the Northwest Power Act.

3. To be "imposed," a measure must be undertaken by a claimant pursuant to an order issued by a Federal agency by force of regulation or law. Water releases from upstream projects will not qualify for compensation unless

the claimant is required by an order to store or release water under authority of law.

* * *

II. Final Policy

Section 1. Effective Date

This policy shall be effective 31 days from the date of its publication in the **Federal Register.**

Section 2. Definitions

A. "Claimant" means any non-Federal hydroelectric power project licensee requesting compensation under this policy.

B. "Basin" means the Columbia River and its tributaries within the borders of the United States.

C. "Costs and Power Losses" means those unavoidable monetary costs and electric power losses directly caused to non-Federal hydroelectric power projects as a result of a Federal agency's imposition of a Measure.

D. "Council" means the Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council) established by the Pacific Northwest Electric Power Planning and Conservation Act, PL 96-501.

E. "Federal Agencies" for purposes of this Policy means those Federal agencies, other than BPA, which are responsible for managing, operating, or regulating hydroelectric power projects, including the U.S. Army Corps of Engineers (Corps), the Bureau of Reclamation (Bureau), and the Federal Energy Regulatory Commission (FERC).

F. "Impose" or "Imposition" refers to the act of applying fish and wildlife obligations or restrictions upon a claimant which the claimant must implement in order to comply with applicable Federal law, regulation, or order.

G. "Measure" means a specific provision in the Program, as contemplated in the Northwest Power Act, calling upon a Federal agency or other entity to undertake actions to protect, mitigate, and enhance fish and wildlife in the Basin.

H. "Program" means the Columbia River Basin Fish and Wildlife Program and amendments thereto adopted by the Northwest Power Planning Council.

Section 3. Conditions Governing Compensation Payment

A. The Administrator will, as a general rule, consider compensation claims only from licensees of non-Federal hydroelectric power projects located within the Columbia River Basin. * * *

B. When any Federal agency proposes to implement a measure which may give rise to a claim, it should consult and coordinate its actions in advance, pursuant to section 4(h)(11)(B) of Pub. L. 96-501. * * *

C. In order to establish entitlement to compensation, claimants must demonstrate to the Administrator that claimed costs and power losses are the direct result of Measures imposed by a Federal agency to mitigate fish and wildlife effects which are not attributable to the development and operation of the non-Federal project which is the subject of a claim.

* * *

Section 4. Requirements for Claims

A. Claimants for compensation must submit a written claim to BPA within 120 days after the date a monetary cost or power loss occurs.

B. Claimants must demonstrate:

1. That claimed monetary costs or power losses have been involuntarily incurred;

2. That the Federal agency imposed upon the claimant a Measure which directly caused the claimed monetary costs or power losses; and

3. The extent to which those fish and wildlife effects addressed by the Measure were not attributable to the development and operation of the claimant's project.

* * *

Section 5. The Administrator's Decisionmaking Process

* * *

Section 6. Form of Compensation Payment

The Administrator shall have discretion to compensate approved claims by non-Federal hydroelectric operators with power, cash, or another reasonable form of payment.

* * *

Section 7. Public Notice and Comment

* * *

Issued in Portland, Oregon, on June 14, 1989.

Roger E. Seifert.

Deputy Assistant Administrator, Bonneville Power Administration, Washington, DC Office.

APPENDIX C

ADMINISTRATOR'S DECISION

POLICY FOR COMPENSATING NON-FEDERAL HYDROELECTRIC PROJECTS FOR MONETARY COSTS AND POWER LOSSES CAUSED BY FEDERAL AGENCY ACTIONS TO IMPLEMENT COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM MEASURES

U.S. DEPARTMENT OF ENERGY
BONNEVILLE POWER ADMINISTRATION
JULY 26, 1989

I. Introduction

This document presents the decisions of the Bonneville Power Administration (BPA) in issuing a final policy governing our consideration of compensation claims filed under Section 4(h)(11)(A)(ii) of the Pacific Northwest Electric Power Planning and Conservation Act (Pacific Northwest Power Act or Act). BPA published a draft policy for public comment in the FEDERAL REGISTER on June 10, 1988. BPA received comments from 24 individuals and entities. This document describes the June 1988 draft policy, summarizes the comments, and indicates the changes incorporated in the final policy that address these comments.

* * *

III. What Federal Actions and Program Measures Are Compensable?

A. What Federal actions should BPA compensate?

BPA Draft Policy. Section 2 of BPA's June 1988 proposed policy provided compensation for "monetary and power losses directly caused as a result of imposition of a measure by a Federal agency to implement specific provisions

in the Council's Fish and Wildlife Program." The proposed policy provided that if actions were taken for other reasons or were not specifically included in the Council's Program, BPA was not responsible for compensation.

* * *

Summary of Comments.

* * *

Analysis and Decision. Section 4(h) supports compensation only for actions taken to implement specific "measures" contained in the Council's Program, using the term "measure" in relation to the Council's Program in a number of paragraphs. For example, under Section 4(h)(2)(A), the Program is to contain "measures which can be expected to be implemented by . . . other Federal agencies." Under Section 4(h)(5), the Program is to consist of "measures to protect, mitigate, and enhance fish and wildlife . . . while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply." See, also Sections 4(h)(5), 4(h)(6), and 4(h)(8)(A) and (B).

The term "measure" is not used in Section 4(h)(11)(A)(i). Though Section 4(h)(8)(C) refers to both Program measures and other measures, Section 4(h)(8)(D) uses the same terminology as Section 4(h)(11)(A)(ii), i.e., "monetary costs and power losses" and specifically ties them to implementation of the Council's Program. Consequently, we interpret the "measures" used in Section 4(h)(11)(A)(ii) to refer to the Program's measures. Based on these and other legislative directives, we conclude that compensable measures do not include Federal agency actions taken independently of the Program or pursuant to other authorities which might benefit fish.

Similarly, actions taken pursuant to Section 4(h)(11)(A)(i) to provide equitable treatment for fish and wildlife are not compensable if they are not contained in the Program as specific measures. Had Congress intended for BPA to be financially responsible to compensate for all Federal ac-

tions that may provide equitable treatment, it would have explicitly specified this intention in Section 4(h)(11)(a)(i), and would have specified this obligation in other statutes.

In many cases the Program is not a prescriptive document. The fact that the Program contains a broadly stated principle, such as "doubling the run as a reasonable interim goal," should not require compensation for any Federal agency action which might contribute to that goal. Federal agencies respond to many authorities as they manage resources for multiple purposes. For example, projects operated by the Corps must meet navigation, flood control, recreation, and irrigation responsibilities in addition to power and fish and wildlife responsibilities. Frequently incidental benefits to fish and wildlife, power generation, or some other resource use may result from an activity intended for another purpose.

Federal agencies also respond to other statutory authorities specifically intended to benefit fish and wildlife. Some statutes preceded and others followed the Pacific Northwest Power Act. We find no compelling argument for a policy that would make BPA ratepayers fiscally responsible for all Federal actions taken pursuant to the diverse statutory or regulatory authorities which benefit fish and wildlife.

Most broadly stated, the utilities' position would make claims for power losses and costs compensable without referring to the Council's Program. Their argument is based on language in Section 4(h)(11)(A)(ii) which requires Federal agencies, in meeting their obligations for fish and wildlife, to take into account the Council's Program. But the mere consideration of the Program, without attention to specific measures, could make any action by Federal agencies compensable regardless of whether it was a part of the regional decision incorporated in the Council's Program.

BPA believes that Congress intended that to be compensated, an action must result from more than mere con-

sideration of the Program. "Considering" the Program is too low a standard to guide compensation decisions. For example, a Federal agency may "consider" the Program but act in manner that is inconsistent, or clearly not contemplated in the Program. It would be unreasonable, and Congress did not intend for BPA ratepayers to be exposed to paying non-Federal projects for decisions made by other agencies which were not explicitly based upon the Council's Program.

The utilities' interpretation would belittle the regional planning process established by the Pacific Northwest Power Act. For example, the House Commerce Committee stated:

> Section 4(h) is designed to provide effective procedures and authorities whereby fish and wildlife of the Columbia River Basin will be treated on a par with power needs and the other purposes for which the hydroelectric dams of the region were built and are operated and maintained. This should ensure a balance for all uses of the river. [H.R. Rpt. No. 976, pt. I, 96th Cong., 2d Sess., 56, *Pacific Northwest Power Act,* S. 885 (May 15, 1980).]

The Pacific Northwest Power Act created the Council primarily to address a lack of cooperation which existed among power and fishery interests prior to the passage of the Act. The Council and its planning processes provide a vehicle by which diverse regional interests including Federal and non-Federal parties, fishery agencies, Indian tribes, and others may shape a comprehensive plan and program to protect, mitigate, and enhance fish and wildlife in the Columbia Basin. (See, for example the House Commerce Committee Report, pp. 56-57.)

It is this regional decisionmaking process, developed through full and open public debate, which Congress intended to guide BPA and other Federal agencies. Agency actions which are not incorporated into the Program have

no corresponding public or BPA review. BPA's interpretation gives importance to the Council, its Program, and the diverse parties whose participation ensures the Program addresses the Region's interest. It also protects the ratepayers' interests by limiting BPA financial exposure for compensation to regional, public decisions.

BPA views the written Program as the guide for compensation decisions. Oral and written communications to Federal agencies from and among individual Council members and staff are not the proper instruments to make vague or conflicting Program measures more specific. Such informal communications are especially not the appropriate means of modifying Program intent. If a conflict or ambiguity arises, the Council may elect formal Program amendment procedures to instruct a Federal agency as to the Council's original intent. The Program amendment process is the only way the public, ratepayers, and affected projects may effectively participate in decisions that might result in costs or power losses.

B. Can the release of water by the Corps or the Bureau for fish and wildlife purposes be an "imposition" of a measure within the meaning of the statutory language? If claimants agree in advance to an action, is it an imposition?

BPA Draft Policy. The June 1988 proposed policy was ambiguous as to whether the release of water from an upstream project would be considered an "imposition." It acknowledged that the release of water might create monetary costs or power losses which might qualify for compensation. But the proposed policy also defined "impositions" as "obligations or restrictions which a non-Federal hydroelectric power project must implement or comply with because of Federal law, regulation, or order applicable to the project." The release of water from upstream Federal projects would not fall under this definition.

The policy did not address how implied or express agreements among project operators might already provide for compensation. We did not consider how these agreements may affect, or be affected by, measures in the Council's Program. We did not address how BPA should consider agreements that claimants or their agents may sign which might ultimately be included in the Council's Program and which result in actions that create costs or power losses.

* * *

Summary of Comments.

* * *

Analysis and Decision. We believe Congress intended the word "impose" to refer to the legal obligation of a project operator to take a particular action or to refrain from a particular action, which obligation arises from an order, regulation, or other requirement applicable to the facility under authority of law. This is consistent with the commonly understood definition of impose: "To levy or exact as by authority; to lay as a burden, tax, duty or charge." [*Black's Law Dictionary* 680, (5th ed. 1979).]

This interpretation is also consistent with the legislative history of the Pacific Northwest Power Act. Only the imposition of measures by regulatory order, i.e. FERC order, is mentioned in the House Interior Committee Report on the Pacific Northwest Power Act:

> Subparagraph 4(h)3(A) also requires the Administrator to reimburse non-Federal projects for monetary costs of power losses to the extent program measures not attributable to those projects themselves are imposed upon the projects as a result of the consideration given the program by other agencies (e.g., FERC). [H.R. Rpt. No. 976, pt. 2, 96th Cong., 2d Sess., 46, *Pacific Northwest Power Act,* S. 885 (May 15, 1980).]

Congressman Dingell's floor explanation of Section 4(h)(11) expressly discusses FERC orders and FERC's ability to

use the statute and other authorities to protect fish and wildlife:

> The directives of this section are applicable to FERC and other Federal agencies. They apply to the exercise of responsibilities by FERC and those other agencies. Those responsibilities include the oversight and administration by FERC of Federal licenses, permits, and certificates, including those applicable to non-Federal power facilities located on the Columbia River and its tributaries. [*Congressional Record,* E5104 (daily ed.) December 1, 1980.]

In addressing a provision that maintained the validity of existing Federal permits, licenses, or certificates, Congressman Dingell also contemplated that legal or regulatory proceedings would be necessary before a measure can be imposed:

> [The disclaimer] does not preclude the modification of any Federal license, permit or certificate—including the terms and conditions thereof—under the Federal Power Act, as supplemented by this bill, including section 4(h)(11). Under this supplemented authority, such a modification may ultimately be required by FERC or a court to protect, mitigate, or enhance fish and wildlife. [*Congressional Record,* E5105 daily ed.) December 1, 1980.]

Although the most likely circumstance for measures to be imposed is through orders involving FERC proceedings, we will examine claims for compensation when any Federal agency or court uses its regulatory authority to exact performance by an imposition.

The term "imposed" as used in Section 4(h)(11)(A)(ii) of the Pacific Northwest Power Act requires a compelled action by order or imposition of authority. This is different

from a merely incidental effect on the ability of the project operator to use water flows, as occurs when the Corps or Bureau release water in consideration of the Council's Program. On the other hand, a FERC order which requires a non-Federal operator to store or release the incoming flows might be an imposition.

Accordingly, water flows might be compensable as imposed measures, but only to the extent they are required to be released or stored by a non-Federal project pursuant to the authority of a Federal Agency to address a problem not attributable to the Project. Water flow measures in the Council's Program which are implemented by the Corps or Bureau through water releases from upstream Federal projects are not impositions upon non-Federal projects.

When it enacted the Pacific Northwest Power Act, including Section 4(h)(11), Congress did not intend to disrupt or void provisions of existing contracts and agreements, such as the Pacific Northwest Coordination Agreement (PNCA). Section 10(B) of the Pacific Northwest Power Act provides: "Nothing in this Act shall alter, diminish, or abridge the rights and obligations of the Administrator or any customer under any contract existing as of the effective date of this Act."

Congress was aware of the existence and terms of the PNCA, which since 1964 has been the most comprehensive and pervasive agreement governing the coordination of the hydro system in the Columbia Basin. Planning under the PNCA provides a means for including literally hundreds of operating constraints, including many which benefit fish and wildlife, within annual planning for the coordinated system. Losses in generation attributable to flow-related actions of the Corps or the Bureau in implementing the Program are comprehended by the manner in which these agencies operate within such agreements that coordinate the operation of all hydro projects in the Region.

The PNCA includes an overall agreement by all parties to accept any other party's operation to meet requirements for non-power uses or functions. Section 15 provides:

> Nothing in this agreement shall require a party to operate a Project in a manner inconsistent with its requirements for non-power uses or functions, and no party shall be considered in violation of this agreement or suffer any penalty thereunder because of any Project operation undertaken in good faith for the purpose of preserving priority to such non-power uses or functions, or of protecting against harm to human life or property.

The PNCA signatories, including the Mid-Columbia PUDs, have agreed that they would not have any right to recover compensation for non-power flows under the PNCA except insofar as that agreement provides by its operation for a distribution of benefits and losses.

* * *

APPENDIX D

SUMMARY OF THE LEGISLATIVE HISTORY OF THE FISH AND WILDLIFE PROVISIONS OF THE PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT

The initial legislation introduced by Pacific Northwest legislators in Congress in 1977 focused solely on (1) procedures to devise a regional power plan with maximum public participation, (2) authorization for BPA to expand its power supply by energy conservation and purchases from other utilities, and (3) allocation and pricing of the expanded regional federal power supply. The impact of existing hydroprojects and future projects on the region's fish and wildlife resources was not addressed in those bills and barely mentioned in the related hearings. For example, in the initial Congressional hearings on the legislation in 1977, only the Isaak Walton League urged Congress to pay some attention to the depleted state of fish and other regional values caused by hydropower development and recommended that BPA should fund necessary mitigation measures:[1]

> Over the past forty years the installation of the federal hydro dams on the Columbia River system has had a major adverse effect upon anadromous fish runs. Population and industrial growth made possible by the cheap hydro power have caused additional adverse effects and at the same time created vastly increased demand for the diminishing fish runs for both food and recreation. . . .
>
> These lost fish and wildlife, cultural and recreational values should be fully restored or mitigated. BPA, representing the major beneficiary

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[1] *Hearings on H.R. 9020, H.R. 9664 and H.R. 5862 before the Subcommittee on Water and Power of the House Committee on Interior and Insular Affairs (Pt. 4)*, 95th Cong., 1st Sess. 195 (1977).

> from the dams that caused the damage, should provide to appropriate federal, state, and local agencies from current power revenues the funds for the restoration or mitigation.

The hearings before the Senate Energy and Natural Resources Committee the following year were similarly almost devoid of any attention to fish and wildlife issues, except for the Sierra Club's urging that Congress require the federal agencies "to upgrade attention to fisheries impacts throughout the power planning and management effort".[2]

It was not until late 1978, during the hearings by the House Interstate and Foreign Commerce Committee's Subcommittee on Energy and Power, chaired by Rep. John Dingell (Mich.), a longstanding advocate of fish and wildlife interests, that serious attention began to be focused on the fish and wildlife implications of the existing and proposed regional production program. Chairman Dingell questioned a number of federal, state and regional fishery witnesses who provided information on the state of the Columbia River Basin fisheries and what might be done about it. These witnesses emphasized the need for increased minimum streamflows in the main stem of the Columbia River. The Washington Department of Fisheries summarized the problem as follows:[3]

> The Columbia Basin water and electrical energy resources are interrelated to a degree unequaled anywhere else in this country on this scale. Under present levels of water storage development and operational procedures, there is not sufficient

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[2] *Hearings on S. 2080 and S. 3418 before the Senate Committee on Energy and Natural Resources (Pt. 2)*, 95th Cong. 2d Sess. 1047 (1978).

[3] *Hearings on H.R. 13931 before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce*, 95th Cong. 2d Sess. 421-22 (1978).

water in the main stem Columbia and lower Snake Rivers during years of low and average runoff to "maximize" hydropower production and "optimize" downstream passage conditions for upper Columbia Basin salmon and steelhead at main stem Columbia and lower Snake River dams and reservoirs.

* * *

The drought of 1977 was an example of the future. With far below average flows, total river control was achieved. Over 62 million juvenile salmon migrants moved seaward from the Washington streams and hatcheries and the Snake River. This does not include the Oregon production. Of this figure, 18 million spring and summer chinook and sockeye from the upper Columbia and Snake Rivers suffered a 70 percent mortality. Fall chinook from hatcheries in the lower river incurred mortalities of approximately 15 percent. In 1978 with a near average runoff, similar conditions existed. Total river control was again achieved with the same inherent fish problems. We cannot sustain a viable resource in the face of these losses, yet that is what the future holds unless immediate steps are taken to provide flows for fish.

The immediate main stem flow needs of upper Columbia Basin salmon and steelhead runs can be met only by reducing or at least modifying hydrogeneration at main stem dams to free water to flush downstream migrants through reservoirs and over dams.

* * *

In our opinion, the legislation must provide clearly for balancing the interests of maximizing power

> revenues with the requirement of anadromous fish.

The State of Washington's assessment and recommendations were echoed by other state and regional fisheries interests. *Id.* at 278-79, 507, 693, 827-33. Chairman Dingell stated that he shared their concerns and expressed the view that "one of my major concerns up to this point has been the inadequacy of the measures to protect the fish in connection with production on the river and included in that concern are some past mistakes which could be corrected here that have not been included in the proposal that we have seen here before us". *Id.* at 698.

The Governor of Idaho and the witness for its Fish and Game Commission described the various structural and flow management components of a comprehensive fish mitigation and enhancement program and agreed with Rep. Dingell that the costs of such programs ought to be borne by the electric ratepayers (*id.* at 829-30):

> MR. RICHARDS. Mr. Chairman . . . There are various programs—some in various stages of implementation, some being considered regarding mitigation, enhancement. There are other programs involving the mechanics of fish passage both upstream and downstream such as screening turbines, transporting juvenile migrants around dams, structural modifications to dams to alleviate nitrogen supersaturation—
>
> MR. DINGELL. You are talking about existing and any projected construction, are you not?
>
> MR. RICHARDS. I am. Now these are programs which are—some, as I say, are in effect, others are being considered and they are from our feeling viable programs which will accomplish our goal which is to return the runs of anadromous fish returning from the Snake River to their pre-

dam levels but there is one other component of these passages that is very vital. These things have to be looked at as a package, they cannot stand alone. The vital part of the package which is concerned with this legislation is the matter of flows. Experience has shown us that with all these other measures such as the transportation of downstream migrants, the structural modification of dams, they are essentially meaningless if flows are not provided to get the juvenile migrants to the dams where these methods can be effective. So what we are talking about here specifically in regard to this proposed legislation is a matter of supplying flows for fish and if this is done it does interfere to some degree with the maximization of hydropower production.

* * *

MR. DINGELL. You may want to refer this to the Governor, but I detect that you are indicating to us that you feel that the costs of the kinds of undertakings we are talking about, both in terms of construction and management actions and maintenance of stream flows is, something which should be a concern to the ratepayer and should be essentially something which as principal beneficiary the ratepayer ought to address through the necessary and proper payments to assure that the mitigation of loss of your fish resource from electric power generation should be a ratepayer expense. Now am I correct in that?

GOVERNOR EVANS. I have never analyzed that myself. I presume we are really talking in terms of trying to protect the resource, and it is the general responsibility of the entire general fund of the Federal Government really to protect and

> enhance the resource that was there before we started to build the dam. So if we get right down to it, it would be the ratepayers that would have to pay.
>
> MR. DINGELL. Well, he is the guy that is getting the benefit from the electricity and if he is going to decimate the salmon he ought to try and mitigate that. That is just part of the cost of doing business.
>
> GOVERNOR EVANS. Absolutely, and I think that is the base line.

Early in the next Congress Chairman Dingell requested the General Accounting Office to analyze the fisheries impacts of the proposed legislation. The GAO's report of September 4, 1979[4] described the causes of the declining fishery stocks and recommended, *inter alia*, that the federal agencies be directed to establish "minimum stream flows on the mainstem Columbia River system adequate to protect and enhance the anadromous salmon and steelhead fisheries" (*id.* at 25-26) and that a "fisheries council" be created with authority "to annually schedule and direct the release of water designated for fishery restoration". *Id.* at 26. Its program would be funded with "appropriations or with a percentage of BPA and utility power revenues sufficient to fund its authorized activities and whatever legal actions are necessary to protect and enhance the fisheries". *Id.* at 26.

Meanwhile, new authorization bills had been introduced in the 96th Congress, a number of which took different approaches to the fish problems identified in the earlier hearings. S. 885 was introduced by Senator Jackson (Wash.) in the Senate. Although it contained no fish provisions, during the Senate Energy and Natural Resources

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[4] U.S. Comptroller General, *Impacts and Implications of the Pacific Northwest Power Bill* (EMD-79-105).

Committee hearings Senator Packwood (Ore.) argued that Congress "should require Federal and non-Federal organizations with hydroelectric dams on the Columbia River Basin to participate in providing enough water for this purpose [of providing minimum flows]".[5] Section 4(h) of the bill as reported required the proposed Northwest Electric Power Planning Council to solicit and consider fishery recommendations from the region's state and federal fisheries agencies in developing the Council's mandated regional power plan. Any fish proposals adopted in the plan were to be budgeted by the Administrator and paid for from the BPA fund or appropriations. In addition, the Administrator was to "acquire and dispose of power and utilize the flexibility of the resources available to him in a manner which will assist in the preservation and enhancement of the anadromous fisheries resource". S.Rep. No. 96-272, 96th Cong., 1st Sess. 4 (1979). S. 885 passed the Senate on August 3, 1979 without further amendment of its fishery provisions and was jointly referred in the House to the Interstate and Foreign Commerce and Interior and Insular Affairs committees, which had just begun hearings on a number of House bills on the subject, most of which contained various approaches to the fisheries issues.

During the Interstate and Foreign Commerce Committee hearings the BPA Administrator explained BPA's role in fish protection efforts, stating that the federal investment of $178.8 million in fish facilities at Corps of Engineers and Bureau of Reclamation dams in the region were reimbursable from BPA power revenues.[6] He also described the cooperative efforts between the federal agen-

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[5] *Hearings on S. 885 before the Senate Committee on Energy and Natural Resources*, 96th Cong., 1st Sess. 52 (1979)

[6] *Hearings on H.R. 3508 and H.R. 4159 before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 167 (1979).

cies and non-federal projects in the region during the low flow years of 1977-79 (*Id.* at 145-46):

> We also have taken steps in cooperation with and consultation with the water management agencies, the Bureau of Reclamation, the Corps of Engineers and the operators of non-Federal dams on the river—particularly those operated by the mid-Columbia public utility districts—for the last 3 years in what has been called Operation Fish Flow.
>
> We have worked out understandings and agreements as to how the dams will be operated, how releases will be made for the specific purpose of aiding the passage downstream, for example, of the smolt, the young fry.
>
> Two things have to be done; two different kinds of water management. One is spilling sufficient water at the dams, water that will not go through the turbines, so that the fish may pass over the lip of the dam rather than through the turbine; another is maintaining sufficient water in the river so that the fish will pass downstream safely with a sufficient water supply and will follow the movement of that water downstream.
>
> That is the kind of activity we are involved in now. . . . [C]osts in terms of lost power generation for the operation of fish flow this year. . . . along with storage and transmission revenues lost, totals about $2.5 million.

The General Accounting Office witness reiterated the GAO's fish recommendations in its September 4, 1979 report. *Id.* at 177-78.

The Director of the U.S. Fish and Wildlife Service highlighted the conflict between fish and power interests as follows (*Id.* at 185):

> Protective measures can be provided, but a major obstacle in the development of these has been the differing priorities of fishery agencies and water managers. Generally, methods currently used to increase fish passage through bypassing turbines will result in decreased generating capacity. For instance, fishery agencies believe that at the present time the use of spill with sequential generator reduction is absolutely necessary to the maintenance of adequate fish populations. The prospect of reduced power production for the sake of fish is not always appealing to those responsible for providing light and heat to homes and industries.

The FERC explained its role and authority in regulating the non-federal dams on the main stem of the Columbia for fish purposes under the Federal Power Act (*Id.* at 196-97):

> Our authority, the Commission's authority with respect to this sort of thing, is contained in section 10(a) of the Federal Power Act, and under the authority of that section an FERC license usually includes several conditions or articles providing for continuing protection of natural resources affected by the project.
>
> The runs of anadromous fish of the Columbia are affected by hydroelectric projects, and provisions for protecting these species are contained in the project licenses. On the main stem of the Columbia and Snake Rivers, there are five FERC licensed projects. These licenses contain conditions to provide such protective measures as fish passage facilities, artificial propagation facilities, minimum flow requirements, and maintenance of reservoir levels. They also contain articles requiring reasonable changes in the project or its

> operation for the conservation of fish and wildlife, after the licensee has had an opportunity for hearing. These changes may be initiated by a State or Federal resource agency and may be ordered by the Commission upon showing of substantial evidence that modifications are needed to protect the fisheries' resource.
>
> For example, the Commission, in response to agency recommendations during the drought of 1977, ordered licensees on the mid-Columbia to spill water to facilitate the safe downstream passage of juvenile salmon and steelhead trout. This was accomplished in coordination with the Corps of Engineers operation of their projects on the river.

FERC also explained that the recommendations of the fishery agencies and the GAO to establish minimum flows were then being partially implemented in a FERC proceeding in which agreement had been reached with the non-federal project licensees for certain minimum flows pending further studies. *Id.* at 210-11. In those proceedings a disputed legal issue was the extent of FERC's authority to require "reasonable modifications in project . . . operations" to increase project releases for minimum flow purposes pursuant to various license conditions. *See, e.g., id.* at 24.

The Columbia River Fisheries Council spokesman expressed concern over the BPA's lack of authority to require the Corps, the Bureau or the non-federal projects to take particular fish protection actions and recommended a "directive" in the legislation that would insure compatibility of those projects with the fisheries component of a regional power plan. *Id.* at 294.

S. 885 was amended and reported by the Interstate and Foreign Commerce Committee on May 15, 1980. H. R. Rept. No. 96-976 (Part 1), 96th Cong., 2nd Sess. Its fish

protection provisions were substantially expanded as follows:

(1) The enumerated purposes of the bill in section 2 were broadened to include fish and wildlife protection, mitigation and enhancement. *Id.* at 3.

(2) Section 4(h)(1) directed the Council to solicit fish and wildlife recommendations from federal and state fish agencies and mandated the Council to adopt them if not inconsistent with the purposes of the Act. *Id.* at 7-8.

(3) Section 4(h)(2) directed the BPA Administrator to use the BPA fund and authorities under the proposed Act and other legislation to implement fish and wildlife protection, mitigation and enhancement measures "in a manner consistent with the plan and the purposes of this Act, including the recommendations adopted pursuant to paragraph (1)." *Id.* at 8.

(4) Section 4(h)(3) required the federal agencies to take the following actions (*Id.* at 8):

> (3) The Administrator and other Federal agencies responsible for the management or operation or regulation of the Federal Columbia River Power System hydroelectric projects or the hydroelectric facilities of any customer or any other electric utility located on the Columbia River or its tributaries shall exercise such responsibilities, consistent with the purposes of this Act, to adequately protect, mitigate and enhance fish and wildlife, including related spawning grounds and habitat affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated or regulated under other provisions of law.

(5) Sections 4(h)(4) and (5) imposed certain consultation and reporting obligations on the federal agencies. *Id.*

The report's explanation of the amendments (*id.* at 30, 44-49, 50 and 56-57) highlighted the findings of the GAO report and the recommendations of the fishery agencies and interests for greater cooperation in minimum streamflow maintenance from the federal agencies and the non-federal projects. It concluded that "[m]oney, a reasonable amount of time, clear regulatory authority, and cooperative participation by the various interests will be needed to protect and rejuvenate the fish and wildlife resources of this region." *Id.* at 49.

S. 885 was then referred to the House Interior and Insular Affairs Committee for further consideration and was reported with amendments by that committee on September 16, 1980. H.R. Rept. No. 96-976 (Part II), 96th Cong., 2nd Sess. The Committee significantly expanded the fish and wildlife sections. Section 4(h) was amended to impose an affirmative duty on the Council to develop a fish and wildlife "program" through an expanded public participation process, and the purposes of the measures to be included in the program were enumerated. *Id.* at 7-9. The language that is now section 4(h)(11)(A) of the Act appeared for the first time as section 4(h)(3)(A), as follows (*id.* at 9):

> (3)(A) The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—
>
> (i) exercise such responsibilities in coordination with one another, consistent with the purposes of the Act and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that

provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated under other provisions of law;

(ii) exercise such responsibilities, taking into account at each relevant stage of decision-making processes to the fullest extent practicable, the program adopted by the Council under paragraph (1).

If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with paragraph (2) of this subsection.

The general purposes of the fishery amendments were described as follows (*id.* at 37-38):

This bill provides, primarily through section 4(h), a mechanism agreeable to both the power and fisheries interests in the Pacific Northwest for developing a comprehensive program to protect, mitigate and enhance fish and wildlife resources affected by the hydroelectric facilities on the Columbia River and its tributaries. The bill creates a forum for the resolution of conflicts between fisheries and power interests on this unique and complex river system, and provides a means for funding the fish and wildlife provisions adopted as part of the program. Although this approach is not intended to create any new obligations with respect to fish and wildlife, it will provide a system for insuring that existing fish and wildlife

obligations are fulfilled while simultaneously assuring the region an economical and reliable power supply. This approach should work extremely well on the Columbia River and its tributaries without creating an adverse precedent for either fisheries or power interests in other regions of the country.

Specifically, section 4(h) requires the Council to promptly develop a comprehensive program of fish and wildlife measures based on recommendations of the region's fisheries agencies, utilities and others. The section sets out specific criteria such recommendations must meet in order to be included in the program. Once developed and adopted, the program will be incorporated into the regional electric power and conservation plan, but will also exist independently of the plan. BPA is authorized to use its power revenues and borrow from the Treasury for the purpose of implementing the program. Other Federal agencies, whose existing authorities are not changed by this legislation, are required to take the fish and wildlife program into account in exercising their independent statutory responsibilities. Finally, although section 4(h) does not apply to rivers in the region other than the Columbia River and its tributaries, the fish and wildlife resources on those other rivers will be protected under this legislation through other provisions designed to minimize environmental impacts generally in the implementation of this Act.

This legislation does not itself authorize any appropriation of water for fisheries purposes; all actions of other Federal agencies, including actions to assist fish migration, must be taken under other authorities. The goal of the program is not to increase the obligations of water project

> owners and operators, but rather to go beyond a project-by-project approach on a river system whose multiplicity of projects and interdependent biological species makes a project-by-project approach unsatisfactory for all involved parties.

The specific purpose of section 4(h)(3)(A) was briefly explained as follows (*id.* at 46):

> Subparagraph 4(h)3(A) also requires the Administrator to reimburse non-Federal projects for monetary costs of power losses to the extent program measures not attributable to those projects themselves are imposed upon the projects as a result of the consideration given the program by other agencies (*e.g.*, FERC).

Two days after S. 885 was reported by the Interior and Insular Affairs Committee, H.R. 8157 was introduced by the principal House sponsors of the prior bills. Section 4(h)(11)(A) embodied the identical language of section 4(h)(3)(A) as reported by the Interior and Insular Affairs Committee. However, the compensation provision as printed in H.R. 8157 was no longer a separate paragraph, but a continuation of subsection (ii) of section 4(h)(11)(A). *See* 126 *Cong. Rec.* 27836. H.R. 8157 was described by Rep. Dingell as a compromise resolution of the different versions of S. 885 reported by the two House committees. The fish and wildlife provisions were explained as follows (*id.* at 26677):

> III. FISH AND WILDLIFE PROGRAM—SECTION 4(h)
>
> (a) Council must adopt program to protect, mitigate, and enhance fish and wildlife. Program becomes part of above plan.
>
> (b) Applies solely to fish and wildlife on the Columbia River and its tributaries. Nothing shall alter, modify, or affect in any way the laws ap-

plicable to rivers or river systems, including electric power facilities related thereto, other than the Columbia River and its tributaries, or affect the rights and obligations of any agency, entity, or person under such laws.

(c) Council solicits recommendations from Federal, and the region's State, fish and wildlife agencies, Indian tribes, and others. They have 90 days to respond, but this time can be extended. Provision for public comment and hearings.

(d) Sets forth criteria and principles for program. Council determines if recommendations are consistent with purposes.

(e) Council to adopt program within 1 year after time established for receipt of recommendations.

(f) BPA to use its revolving fund and authorities to protect, mitigate, and enhance fish and wildlife affected by hydro projects of Columbia River and tributaries. Expenditures from fund made in accordance with requirements of Columbia River Transmission System Act under which the revolving fund was established.

When S. 885 was taken up by the House, Rep. Lujan, speaking for the House Interior and Insular Affairs Committee, explained the evolution of the fish provisions of H.R. 8157 as follows (*Id.* at 27812-13, 29802):

> It provides for the rebuilding of the salmon and steelhead runs that have been damaged by hydro development on the Columbia River, with the cost to be paid by the ratepayers in the Northwest, not by U.S. tax payers.
>
> * * *
>
> One of the touchiest problems involved in the bill is the problem of fish enhancement. How do we choose between using a given flow of water to

produce badly-needed power and using the same flow to maintain adequate stream flow for fish runs. That question was a wedge dividing, on one hand, the public and private power companies and their customers, and on the other hand the commercial and sport fishermen, the Indian tribes and environmental groups.

It would have taken the wisdom of Solomon for our committee to have worked out an answer that would be satisfactory to all. During our committee deliberations, I took personal responsibility to insure that the provisions in the bill for the protection, mitigation and enhancement of fish and wildlife were both effective and balanced. I was aided in this effort by an ad hoc committee of representatives from each of the affected groups in the Northwest. After weeks of discussion and negotiation this committee arrived at proposed language that was acceptable to nearly every power interest and nearly every fish and wildlife interest group in the region. It was very gratifying to me to be able to offer that language as amendments in committee markup and to have the committee adopt those amendments without opposition.

I am even further gratified to see that same language, with only a few modifications incorporated into H.R. 8157, which is a reconciliation between the Commerce and Interior reported bills. It is fortunate that the similarity of the provisions of H.R. 8157 will allow the explanations in the report of the Interior Committee (H. Rept. No. 96-976, part II) to be used to interpret and guide the implementation of these important provisions.

* * *

The fisheries provisions of the bill are all the

> more unique by being carried out at the expense of the people of the Northwest rather than the taxpayers nationally as has been the case with fish mitigation provisions in the past. And they are even more unique by having been agreed upon by all of the competing interests on the river: Commercial fishermen, private power companies, public power companies, Indian tribes, State fish and game departments, Federal Fish and Wildlife agencies and nongovernmental groups of sportsmen and environmentalists. It took hard work and a lot of give and take to arrive at this consensus, and it will require a lot of cooperation on the part of these groups to make that consensus work. The bill provides the mechanism for that cooperation.

Rep. Swift expanded on Rep. Lujan's discussion of the genesis of the fish amendments (*id.* at 27819):

> Sixth. The bill balances power production and fish and wildlife protection: Mr. Dingell drafted the fish and wildlife provisions that prompted a historic series of meetings between fish agencies and power interests in the Pacific Northwest. The goal was to develop a mechanism for the drafting and implementation of a comprehensive program for the protection, mitigation, and enhancement of fish and wildlife affected by the hydroelectric facilities on the Columbia River and its tributaries. This was an extraordinarily difficult and delicate task, and one whose successful completion would not have been possible without the full-time effort of Mr. Dingell and his able staff. As a result, the bill now contains fish and wildlife provisions that meet the two key tests: First, the provisions are satisfactory to both fish and power interests in the Northwest; second, they are carefully written to avoid any cause for renewed con-

> cern by either fish or power interests in other regions. Because these provisions meet these two tests, they represent legislative craftsmanship at its very best, and our region owes a particular debt of gratitude not only to Mr. Dingell, but also to Mr. Lujan and other members of Interior Committee who succeeded in perfecting these provisions

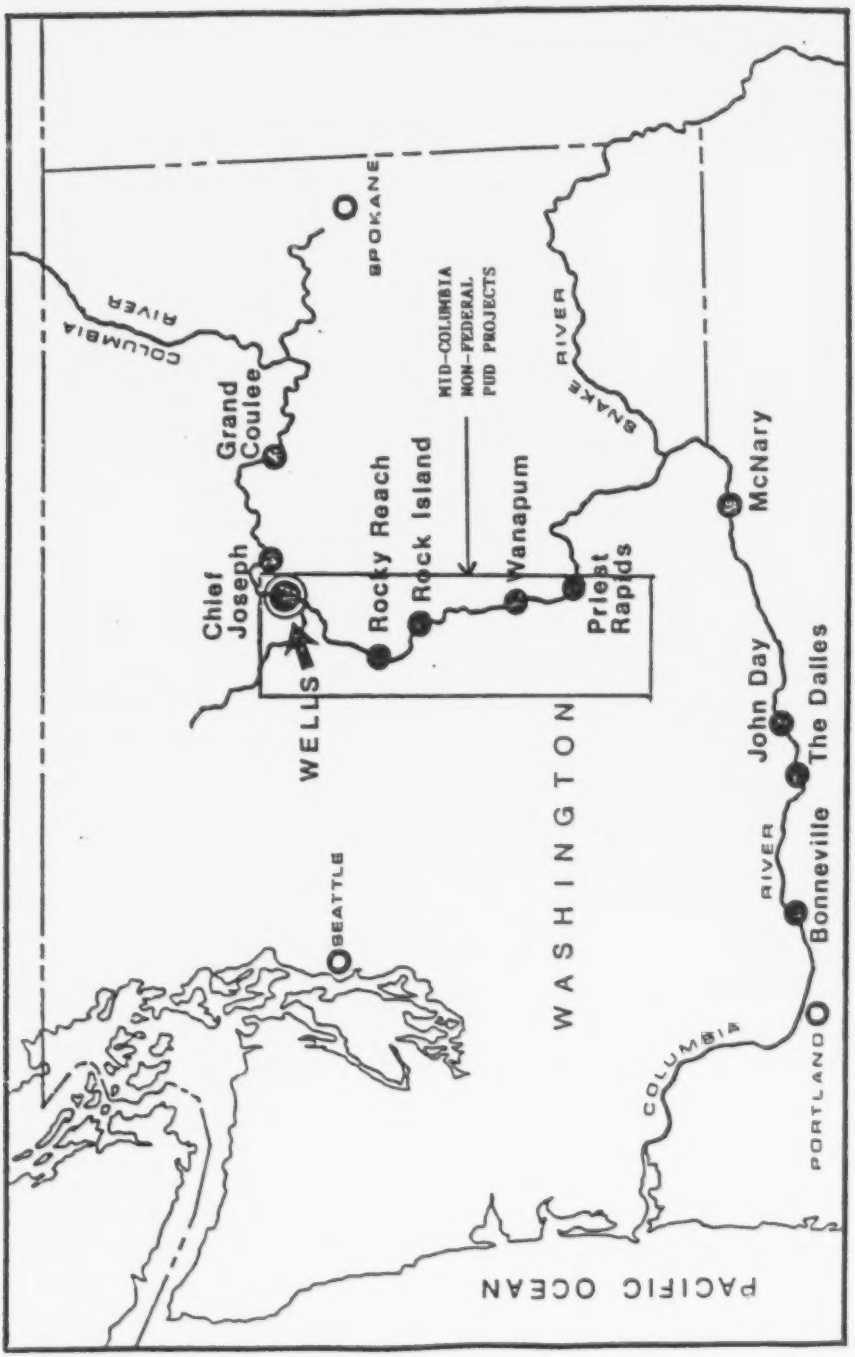
Rep. Dingell explained the relationship of the fishery amendments in H.R. 8157 to S. 885 and then summarized their purposes, including section 4(h)(11)(A) (*id.* at 29809, 29810):

> Many of the provisions of H.R. 8157 relative to fish and wildlife are identical or nearly so to the provisions of the Commerce version, as amended by the Interior Committee. The approach taken in the Interior version is somewhat different in that the Commerce version provided for the making of recommendations and the adoption of those recommendations. This bill continues the process of providing for recommendations, but adopts the Interior approach which provides that the council adopt a comprehensive fish and wildlife program, based on the recommendations, for fish and wildlife protection, mitigation and enhancement.
>
> It creates a new obligation on the region, the BPA, other Federal agencies to protect, mitigate and enhance fish and wildlife. It is a provision for which I am the chief sponsor. It is one that I intend to monitor with great care in the future.
>
> * * *
>
> Mr. Speaker, subsection (h) also provides a directive to BPA and other Federal agencies responsible for the management and operation or regulation of hydro facilities on the Columbia or

> its tributaries to adequately protect, mitigate, and enhance for fish and wildlife affected by such facilities in a manner that insures equitable treatment for fish and wildlife with other purposes for which system and facilities are managed and operated or regulated. They must achieve the directive consistent with the purposes of this act and other applicable laws. This provision does not replace the other provisions of law, such as FERC's section 10 of the Federal Power Act, but supplements that law and others. This provision is aimed at placing fish and wildlife on a par with these other purposes and providing a means by which these entities will act to protect, mitigate, and enhance fish and wildlife. It is, however, not intended to affect the validity of any existing license, permit, or certificate issued by a Federal agency, such as FERC. I particularly refer to the comments of the Interior Committee in its report (page 46) concerning these provisions.

The text of H.R. 8157 was substituted for the text of S. 885 and passed by the House on November 17, 1980. *Id.* at 29962-63. The Senate, with minimum debate, accepted the House version of S. 885 on November 19, 1980. *Id.* at 30188.

APPENDIX E


SPOKANE
COLUMBIA RIVER
Grand Coulee
MID-COLUMBIA NON-FEDERAL PUD PROJECTS
SNAKE RIVER
Chief Joseph
Rocky Reach
Rock Island
Wanapum
Priest Rapids
McNary
WELLS
John Day
The Dalles
SEATTLE
WASHINGTON
COLUMBIA RIVER
Bonneville
PORTLAND
PACIFIC OCEAN
LOCATION MAP

Supreme Court, U.S.
FILED
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(2)

No. 91-1152

In the Supreme Court of the United States

OCTOBER TERM, 1991

PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON, PETITIONER

v.

BONNEVILLE POWER ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Pacific Northwest Electric Power Planning and Conservation Act directs the Bonneville Power Administration (BPA) to compensate non-federal power projects for losses resulting from "measures to protect, mitigate, and enhance fish and wildlife" that are "impose[d]" on the projects by BPA or other federal agencies. 16 U.S.C. 839b(h)(11)(A)(ii). The question presented is:

Whether BPA reasonably interpreted the term "impose" to mean affirmative conduct by the non-federal power projects that is required by federal law, regulation, or order.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 947 F.2d 386.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1991. The petition for a writ of certiorari was filed on January 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Bonneville Power Administration (BPA), a self-financed agency within the Department of Energy, markets power from 30 federal hydroelectric

projects and two nuclear power plants in the Pacific Northwest. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839-839h, commonly known as the Northwest Power Act, is one of four organic statutes governing the functions of BPA. Section 4(h)(11)(A)(ii) of the Northwest Power Act obligates BPA, under certain circumstances, to reimburse nonfederal electric power projects for losses resulting from "measures to protect, mitigate, and enhance fish and wildlife" that are "impose[d]" on the projects by other federal agencies. 16 U.S.C. 839b(h)(11)(A)(ii).

In 1987, the Army Corps of Engineers released water in excess of its water budget from reservoirs along the Columbia River to augment flows and assist juvenile Snake River fish through the lower Columbia River. Three mid-Columbia Public Utility Districts (PUDs) subsequently filed the first compensation claims under 16 U.S.C. 839b(h)(11)(A)(ii), for losses incurred when the Corps released the additional water. After BPA settled those claims—and after notice and comment rulemaking—it adopted a policy to govern future claims. See 54 Fed. Reg. 31,074 (1989) (Pet. App. 22a-28a). The compensation policy defines "[i]mpose" or "[i]mposition" to "refer[] to the act of applying fish and wildlife obligations or restrictions upon a claimant which the claimant must implement in order to comply with applicable Federal law, regulation, or order." Pet. App. 26a. The policy also establishes other requirements and procedures for filing claims. *Id.* at 27a-28a.

2. Petitioner Public Utility District (PUD) No. 1 of Douglas County, Washington, owns and operates a non-federal hydroelectric project on the Columbia River. Together with two other PUDs, petitioner

brought this action in the Ninth Circuit under 16 U.S.C. 839f(e)(5)[1] to challenge elements of the compensation policy. It argued, *inter alia*, that the policy's definition of the term "impose" in 16 U.S.C. 839b(h)(11)(A)(ii) does not comport with the Northwest Power Act. Pet. App. 4a, 17a.[2]

The court of appeals sustained BPA's interpretation of the term "impose." Pet. App. 9a-17a. Although the PUDs argued that the term "includes within its ambit those actions which impose upon the non-federal projects passive burdens * * * such as the release of additional water," *id.* at 9a-10a, the court found BPA's definition to be "entirely reasonable in terms of [the Northwest Power Act] because it recognizes [an] important difference between the two paragraphs in section 839b(h)(11)(A)." *Id.* at 12a. Thus, the court noted that paragraph (ii) of Section 839b(h)(11)(A), which is concerned with actions that federal agencies require non-federal projects to take, obligates BPA to bear certain costs or losses incurred by the non-federal projects, while paragraph (i), which addresses actions that the federal agencies themselves might take, contains no such

---

[1] The Ninth Circuit has exclusive jurisdiction to review final actions taken by BPA pursuant to the Northwest Power Act. 16 U.S.C. 839f(e)(5); *CP Nat'l Corp.* v. *Jura*, 876 F.2d 745, 748 (9th Cir. 1989); *Forelaws on Board* v. *Johnson*, 709 F.2d 1310, 1311-1313 (9th Cir. 1983).

[2] Petitioner and the other two PUDs also challenged BPA's definition of "measures" in 16 U.S.C. 839b(h)(11)(A)(ii). The court of appeals agreed with petitioner's position, Pet. App. 6a-9a, and we do not seek review of that ruling. The court of appeals also rejected challenges to five claim requirements and procedures and found a sixth not ripe for judicial review. *Id.* at 17a-20a. Petitioner does not challenge those rulings.

obligation. Against this background, the court concluded (Pet. App. 12a):

> It is our view that any losses to a nonfederal project as a result of direct action by a federal agency such as the Corps under paragraph (i) is not compensable because that paragraph does not require compensation. Federal action under paragraph (ii), on the other hand, contemplates the imposition of a measure on the non-federal hydroelectric project. The project must then itself carry out the measure to protect, mitigate, and enhance fish and wildlife, and the Administrator must compensate the project.

Noting that several agencies, including the Federal Energy Regulatory Commission (FERC), may require or direct a non-federal electric power project to take affirmative action to preserve fish and wildlife, the court held that "BPA's interpretation of 'impose' in 16 U.S.C. 839b(h)(11)(A)(ii) to include only the affirmative conduct required of non-federal utilities by federal agencies is not inconsistent with the language of the statute, and is therefore reasonable." Pet. App. 17a.[3]

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[3] Judge Thompson dissented. Pet. App. 20a-21a. He acknowledged that the statutory text provides "some support" for BPA's interpretation of "impose." *Id.* at 20a. However, he believed that FERC is the only federal agency authorized to require non-federal projects to take affirmative action, and that because the Northwest Power Act "expressly contemplates that several agencies can impose compensable measures," Congress could not have meant that compensation is due only when affirmative conduct is required. *Id.* at 21a.

ARGUMENT

The Ninth Circuit correctly construed the Northwest Power Act in accordance with general principles of statutory interpretation announced by this Court and found BPA's definition of the term "impose" to be consistent with the statutory text. The Ninth Circuit's interpretation of that particular provision of the Northwest Power Act does not conflict with the decision of any other court of appeals or raise any question of general importance warranting review by this Court.

1. Petitioner erroneously contends (Pet. 23-29) that the court of appeals inappropriately deferred to BPA's construction of the statutory compensation provision because BPA "has a direct and substantial financial interest in the scope of the compensation provision of section 4(h)(11)(A)" (Pet. 23). Petitioner also contends that the court of appeals' standard of review conflicts with the standard followed by the D.C. Circuit. Pet. 24. Each submission lacks merit.

a. Petitioner's argument that the court below should not have deferred to BPA's interpretation is refuted by this Court's prior holding that "[u]nder established administrative law principles, it is clear that the [BPA] Administrator's interpretation of the [Northwest Power] Act is to be given great weight." *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389 (1984); see also *California Energy Comm'n* v. *Bonneville Power Admin.*, 909 F.2d 1298, 1306 (9th Cir. 1990), cert. denied, 111 S. Ct. 1682 (1991). That principle "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understand-

ing of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

In addition, petitioner overstates the nature and extent of BPA's financial interest in the compensation policy. BPA is a self-financed agency that receives its revenues from rates charged for sales of power and for power-marketing services. 16 U.S.C. 832f, 838g, 838h. BPA does not make a profit. Its financial interest therefore is limited to maintaining "the lowest possible rates to consumers consistent with sound business principles." 16 U.S.C. 838g(1). As a result, BPA's interest in the scope of the compensation provision does not differ from its interest in the administration of other provisions of the Northwest Power Act. Indeed, this Court was specifically informed of BPA's far more substantial financial interest in the statutory question at issue in *Central Lincoln* (see Gov't Br. 19), yet it accorded BPA's interpretation of the Act great weight. 467 U.S. at 389.

The logic of petitioner's contrary argument would call into question the established scope of judicial review of not only the actions of BPA, but also those of any agency that disburses funds. Yet the Court has never suggested, for example, that the obligations of the Secretary of Health and Human Services to protect the trust funds established under the Social Security Act give him the sort of financial interest in the administration of the Social Security Act that might deprive his interpretations of the Act of the deference customarily accorded to administrative interpretations. See, *e.g.*, *Sullivan* v. *Zebley*, 493 U.S.

521, 528 (1990) (applying *Chevron* standard and holding that regulations under Social Security Act "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute").

b. Petitioner errs in relying (Pet. 24) on *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987), for the proposition that an "interested" agency's decision is entitled to little, if any, deference. There, the D.C. Circuit discussed at length why it was proper to defer to FERC's interpretation of a settlement that had been agreed to by the plaintiff company and its customers and had been approved by FERC. 811 F.2d at 1568-1571. The D.C. Circuit simply noted in dictum that if the agency had been an interested party to the agreement, "deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract." *Id.* at 1571.

National Fuel does not represent an actual holding that no deference should be given to an administrative determination even where the agency is "interested" in the matter in some legally relevant sense. Moreover, the present case does not involve BPA's interpretation of a contract to which it is a party (the hypothetical situation described in *National Fuel*); it instead involves the interpretation of a complex statute by the agency charged with its administration—the precise situation in which courts have traditionally applied a highly deferential standard of review.[4] For this reason, the court of appeals

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[4] See *Massachusetts* v. *Morash*, 490 U.S. 107, 114-118 (1989); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988); *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107,

here had no occasion to—and did not—either approve or reject the *National Fuel* dictum on which petitioner relies.

2. In any event, the court of appeals' decision upholding BPA's interpretation had ample support apart from the degree of deference articulated by the court. The court subjected BPA's compensation policy to exacting review, which led it to *reject* one element of BPA's compensation policy (see note 2, *supra*), while finding others consistent with the statute. Reading Section 839b(h)(11)(A) as a whole, the court of appeals found BPA's interpretation of "impose" to be entirely reasonable, because it recognizes an important distinction (explicit in the statutory text) between affirmative actions that federal agencies may require non-federal projects to take to preserve fish and wildlife, and actions that agencies may themselves take for that reason. Pet. App. 12a. Thus, rather than producing an absurd result, as petitioner contends (Pet. 18), BPA's interpretation produces the result required by 16 U.S.C. 839b(h)(11)(A)(ii): that BPA will compensate non-federal projects for measures they are directed by federal agencies to take. Petitioner in effect concedes the reasonableness of BPA's interpretation by resorting to speculation that the location of the compensation provision in the Act—which strongly reinforces BPA's interpretation—is the result of a "printing error" (Pet. 21) and occurred for "some unexplained reason" (Pet. 20).

114-116 (1988); *NLRB* v. *United Food & Commercial Workers Union Local 23*, 484 U.S. 112, 123-128 (1987); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 845 (1986); *Chemical Mfrs. Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125-126 (1985); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984).

Furthermore, as BPA explained when it adopted the compensation policy, its interpretation of "impose" as referring to legal obligations incurred by the operator of a non-federal project is "consistent with the commonly understood definition of impose: 'To levy or exact as by authority; to lay as a burden, tax, duty or charge.'" Pet. App. 34a (quoting *Black's Law Dictionary* 680 (5th ed. 1979)). As BPA further explained, that interpretation also is supported by the legislative history, which refers to undertakings that a federal agency, such as FERC, might require of non-federal licensees or permitees for the protection and enhancement of fish and wildlife. See Pet. App. 34a-35a.

3. Finally, petitioner's passing attempt to cast BPA's interpretation of "impose" as an inverse condemnation issue (Pet. 16-17) entirely lacks merit. Petitioner failed to raise or argue that issue before the courts of appeals. Moreover, petitioner has failed to assert, and cannot here prove, a vested and legally enforceable water right. See generally *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 424 (1940); *United States* v. *Grand River Dam Auth.*, 363 U.S. 229, 232 (1960); *United States* v. *Twin City Power Co.*, 350 U.S. 222, 225-226 (1956).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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